

**CHIEF JUSTICE'S COURT**  
HON'BLE THE CHIEF JUSTICE DY CHANDRACHUD  
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL  
HON'BLE MR. JUSTICE RAVINDRA BHAT  
HON'BLE MS. JUSTICE HIMA KOHLI  
HON'BLE MR. JUSTICE PAMIDIGHANTAM SRI NARASIMHA

**ITEM NO.501 COURT NO.1**  
**SUPREME COURT OF INDIA**  
**RECORD OF PROCEEDINGS**

**Writ Petition (Civil) No.1011/2022**

**SUPRIYO @ SUPRIYA CHAKRABORTY & ANR. Petitioner(s)**

**VERSUS**

**UNION OF INDIA Respondent(s)**

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TRANSCRIPT OF HEARING

10-May-2023  
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**MR. TUSHAR MEHTA:** This is the time, we have distributed amongst us. And we have been very, very careful. My Lord, my learned colleague 30 minutes, Manindar 20 minutes, Manisha 20 minutes, J Sai Deepak 20 minutes, then all are 5 minutes. Then I would request at the end to give me 5 to 7 minutes. 7 minutes is outer limit My Lords.

**CHIEF JUSTICE CHANDRACHUD:** So Aishwarya, Manindar, Manisha and Sai they will go 30, 20, 20, 20 - 90 minutes. So we'll be done with their submissions by 12:45. 12:45 they would have finished. And then the others who have about 5 minutes, 4 minutes. We'll ask them, we'll see what to do, and we'll give you 5 minutes at the end. I think 12:55.

**MR. TUSHAR MEHTA:** 5 to 7. I'll not repeat anything, but I would like to say something as a concluding prayer My Lord before Your Lordships.

**CHIEF JUSTICE CHANDRACHUD:** All right. Yes, Ms. Bhati.

**AISHWARYA BHATI:** My Lords, We had circulated a note last week and three compilations. And we have circulated one additional compilation yesterday My Lords. Yesterday evening. Additionally, My Lords I will also be referring to note 2 of the learned SG My Lords, because the aspect with regard to child...

**CHIEF JUSTICE CHANDRACHUD:** Yes.

**AISHWARYA BHATI:** And My Lords at the outset, I must also say that though the application is filed on behalf of NCPCR, but we had to take lots of inputs from the Ministry of Women and Child Development and also CARA. So Lordship may take it that these submissions are comprehensively from these three bodies.

**JUSTICE BHAT:** Which submissions you will be referring?

**AISHWARYA BHATI:** We filed our submit.... I made a brief.

**JUSTICE BHAT:** Yes. We have you a list of... We have written submissions.

**AISHWARYA BHATI:** Lordships have the submissions My Lords. It is in three parts My Lords, Part A, Part B, and Part C. I can actually confine only to Part B, because other aspects

1 are which are covered. But that's just for the sake of completion My Lords, it's a short  
2 note. And there are three compilations My Lords, A, B, C, and one filed yesterday, D.

3

4 **CHIEF JUSTICE CHANDRACHUD:** So we have now a master index by Ms. Bhati.

5

6 **AISHWARYA BHATI:** Please My Lords.

7

8 **CHIEF JUSTICE CHANDRACHUD:** Then we have Part A compilation, Part B,  
9 compilation, Part C, and Part D compilation in your written submissions. That's the...

10

11 **AISHWARYA BHATI:** Lordships, please. My Lords, Part A of my note is My Lord, just... I'll  
12 just give a brief wherever Your Lordships want me to stop and elaborate... I'll just give an  
13 outline. So the Part A really deals with two submissions. First, I have tried to submit that  
14 there's a basic structure of the marriage. And that is a union of man and woman. The second  
15 submission I have is gender fluidity. I'm not elaborating My Lords. Just stating my  
16 prepositions and... The second submission I have is that gender fluidity is  
17 impermissible, where cis gender is core. And ignoring rationale of valid classification amounts  
18 to perpetrating inequality. Then I have given examples of, My Lords, areas which have been  
19 reserved specifically for women, because if these spaces are diluted in any manner, then what  
20 will be lost is really the cause of women's equality, women's well-being, women's  
21 empowerment. That is my second point My Lords. And I've given examples like women's  
22 recruitments, spaces which are specifically for women, women's washrooms, women's  
23 correctional homes, women's... women inmates, welfare homes, ladies Bar Room in the  
24 Supreme Court. When Your Lordships recognized in NALSA, transgenders as a third gender,  
25 Your Lordships did not... using the expression that Mr. Datar did, My Lords, did not retrofit  
26 in the two existing genders. Your Lordships identified them as a third gender. So, My Lords,  
27 it's very critical that gender fluidity cannot be permitted in areas where cisgender is core. That  
28 brings me, My Lords, now to part B, that is specifically with regard to children. And My Lords,  
29 the preposition that I have is, welfare of child is paramount and sacrosanct, and cannot be  
30 opened, exposed even for an iota of potential compromise or uncertainty. For  
31 the first preposition, that is, the child has a right to be born and raised by biological parents.  
32 My Lords, for this I will rely on Note 2 of the learned Solicitor General for India My Lords.  
33 Your Lordships will kindly have page 39 to 49 of that note. There are some research papers  
34 also which is there in their compilation, but the learned SG's note quotes the paragraphs that  
35 are relevant. If Your Lordships will kindly take that with me. Page 39 of Note 2 of learned SG.  
36 "Only for the purpose of these two prepositions, that the legitimate state interest of ideal mode  
37 of child-rearing. My Lords, all children are naturally born only to heterosexual couples. And

1 now, My Lords, when I take Your Lordships through the architecture of laws which are relating  
2 to children, there are no competing rights in this space. The only sacrosanct, paramount right  
3 is that of the child, to the extent that, sometimes a child may need to be protected from himself.  
4 The entire architecture of these laws are from the concept of Welfare of Child being  
5 paramount. So My Lords, my respectful submission is, if My Lords, have page 39 of the learned  
6 SG's note, My Lords?

7

8 **JUSTICE KOHLI:** Which note?

9

10 **AISHWARYA BHATI:** Note 2, My Lords. Note 2 of the learned SG. This chapter My Lords...

11

12 **JUSTICE KOHLI:** Compilation 2? Note 2?

13

14 **JUSTICE BHAT:** Note 2, PDF page 39.

15

16 **AISHWARYA BHATI:** My Lords, it's running 39. PDF should be 44 it could be, My Lords.

17

18 **JUSTICE KOHLI:** 42.

19

20 **AISHWARYA BHATI:** I'm grateful. 42 My Lords. "The legitimate state interest of ideal  
21 mode of child-rearing". Am I with My Lords?

22

23 **JUSTICE KOHLI:** Page 42 starts with Note 2, Fundamental Rights, para 59?

24

25 **AISHWARYA BHATI:** My Lords, this is para 63.

26

27 **JUSTICE KOHLI:** 63. Very well. Got it.

28

29 **CHIEF JUSTICE CHANDRACHUD:** Yes.

30

31 **AISHWARYA BHATI:** My Lords will see, this is for the proposition that legitimate state  
32 interest of ideal mode of child-rearing. Now, Lordships, the fundamental point is that, a child  
33 can only be naturally born through a heterosexual couple, and therefore, the special  
34 significance of recognition of heterosexual marriages cannot be understated from the point of  
35 view of child - birth of child and bringing up of the child, both. My Lords, there are some very  
36 interesting papers that have been put together in the research of this note, and My Lords, these  
37 papers show that fathers and mothers, both play complementary roles in upbringing of the

1 child. And state is justified in treating homosexual and heterosexual unions differently, for  
2 that purpose. The first paper that is quoted in para 66 is, straight is better while law and society  
3 may legitimately prefer homosexual... Heterosexuality, is a paper from a professor of law, My  
4 Lords of Case Western University, Ohio. Your Lordships will find that at page 353, the entire  
5 paper is there in compilation Volume 8 of Learned SG's. It's mentioned here. The  
6 relevant paras are quoted here. And if I can draw your Your Lordships to the last para that is  
7 quoted at the next page, My Lords. Marriage...

8  
9 **CHIEF JUSTICE CHANDRACHUD:** Which page?

10  
11 **AISHWARYA BHATI:** My Lord, I am at page 41... The noted page 41.

12  
13 **JUSTICE BHAT:** Yes, but which compilation?

14  
15 **CHIEF JUSTICE CHANDRACHUD:** Same thing... Same thing.

16  
17 **AISHWARYA BHATI:** Learned SG's note My Lord. I was just giving that the complete  
18 paper is there, but the relevant portions are here. So,... Marriage is not a factory for  
19 childbearing. Marriage exists to encourage men and women to create the next generation in  
20 the right context and simultaneously to discourage the creation of children in other contexts  
21 out of wedlock in fatherless homes. The next paper that's in para 68 is marriage from a child's  
22 perspective, 'how does family structure affect children and what we can do about it?' Please  
23 see the highlighted portion. It is not simply the presence of two parents, as some have  
24 assumed, but the presence of two biological parents that seem to support child development.  
25 Children in single parent families, children born to unmarried mothers, children in step  
26 families or cohabiting relationships face higher risk of poor outcomes, than do children in  
27 intact families headed by two biological parents. Parental divorce is also linked to a range of  
28 poorer academic and behavioural outcomes. The next paper. This is Pennsylvania University  
29 Law Professor. The next chapter is the next paper is 'Tradition, pluralism, and same sex  
30 marriages'. This has four authors. The paper Your Lordships will find in Volume 8 of the  
31 Learned SG's compilation. Please see highlighted portions in the second para. To date, the  
32 research on child wellbeing and family form bears out that children thrive on structure, order,  
33 routine, stability, continuity, certainty, and clarity. The evidence shows that conventional  
34 beats unconventional every time. This means that complexities and ambiguities of non-  
35 traditional families come at a price.

1 **CHIEF JUSTICE CHANDRACHUD:** But Ms. Bhati, our law permits a single person to  
2 adopt a child.

3

4 **AISHWARYA BHATI:** My Lords, permit me to come to that now. Your Lordships will see  
5 this My Lord, the learned SG did not place it. Lordships may note that this is My Lords from  
6 page 39 to 49 on both the prepositions. The first is My Lords, that the legitimate straight  
7 interest, and that I showed to Your Lordships, and that, there are some papers... There is lack  
8 of data to establish equivalents with biological heterogeneous upbringing of  
9 children. Lordships may see it. I just brought it to Your Lordship's notice, because it was  
10 ... the learned SG left it to me, My Lords. Now, please come back to my note, My Lord. Your  
11 Lordships will see...

12

13 **CHIEF JUSTICE CHANDRACHUD:** Which is your note?

14

15 **AISHWARYA BHATI:** Your Lordships had my note. Welfare of child. I was...

16

17 **CHIEF JUSTICE CHANDRACHUD:** One second.

18

19 **AISHWARYA BHATI:** I'm sorry this....

20

21 **CHIEF JUSTICE CHANDRACHUD:** I need to go back...

22

23 **AISHWARYA BHATI:** Written submissions on behalf of...I've said only NCPCR, but it's  
24 also the Ministry and CARA. My Lords will have para 8, at internal, page five at page five of  
25 my submissions. This I have placed. The second preposition is...

26

27 **JUSTICE BHAT:** This is which page? Sorry.

28

29 **JUSTICE KOHLI:** [UNCLEAR] Ms. Bhati.

30

31 **AISHWARYA BHATI:** I'm sorry, My Lords.

32

33 **CHIEF JUSTICE CHANDRACHUD:** This is para 5 at page 4.

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35 **JUSTICE KOHLI:** No. But which note is this?

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37 **JUSTICE BHAT:** The note? You're talking of note?

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**CHIEF JUSTICE CHANDRACHUD:** Ms. Bhati's note. There is only one note.

**AISHWARYA BHATI:** Yes My Lords. Yes, My Lords.

**CHIEF JUSTICE CHANDRACHUD:** Gender fluidity. Right?

**AISHWARYA BHATI:** Yes. That I just mentioned. And then I came to part B, which is at page five. I hope My Lords, Justice. Kaul has my notes....

**JUSTICE KAUL:** Yes, I have it. The welfare of children is paramount and [UNCLEAR]

**AISHWARYA BHATI:** Very grateful. Very grateful, My Lord. Para 8. My Lords, I only touched the prepositions in Part A because it has been extensively dealt with and I am at My Lord, para 10 now. State has *parens patriae* of children My Lords. And this is critical My Lords, I will show to Your Lordships the Juvenile Justice Act because, the entire architecture, when it comes to the legislations with regard to welfare of child, it's the child alone who has rights. And My Lord it's in sync with the UN Child Right Convention. It is in sync with the Constitutional philosophy and ethos. And please see how the Juvenile Justice Act deals with. May I... may I request Your Lordships to take my compilation A. I put the Acts there so I can show...

**CHIEF JUSTICE CHANDRACHUD:** Why don't we go through your written note? It will be much better so that we get a structure in our mind.

**JUSTICE BHAT:** They never necessarily go there.

**AISHWARYA BHATI:** I'm not touching this aspect of *parens patriae* any more than mentioning it that it's a settled.

**CHIEF JUSTICE CHANDRACHUD:** Absolutely. Very well settled. So you don't have to read out the case laws.

**AISHWARYA BHATI:** From Your Lordship's judgment. Then Your Lordships will see para 11 My Lords. The architecture of child legislations is so pervasive and so significant that it even extends to covering beneficially the mother of the child. Human child, My Lords, I don't have to state it, but human child really is one of the most helpless child of all living

1 beings in the nature. And it needs all pervasive, intense and indulgent care in the early years.  
2 And therefore My Lords mother has been strongly protected not just in the Constitution, but  
3 also in the Juvenile Justice Act, the Maternity Benefit Act.

4

5 **JUSTICE BHAT:** Yes.

6

7 **AISHWARYA BHATI:** My Lords, Article 42 I have adverted to in para 11. And  
8 para 12, I have stated that that a gender may be fluid, but the idea of mother cannot be, and  
9 therefore it is very pertinent and important that this is given a very careful consideration. The  
10 whole perspective is that what I'm presenting for Your Lordship's kind consideration is from  
11 the point of view to show to Your Lordships, that this architecture how it is going to  
12 be impacted by a declaration and reading it into Special Marriage Act.

13

14 **JUSTICE KOHLI:** <NO AUDIO> Their defence is a situation which is... forget about the  
15 gender part where there's sometimes only a father.

16

17 **JUSTICE BHAT:** We've gone beyond motherhood. We have gone into parenthood  
18 today. Because there are, as Justice Kohli has mentioned, there are single parents.

19

20 **JUSTICE KOHLI:** Male or a female.

21

22 **JUSTICE BHAT:** There's a death at childbirth. The mother unfortunately dies of disease or  
23 accident.

24

25 **JUSTICE KOHLI:** The compulsion.

26

27 **JUSTICE BHAT:** There is no question of the caregiver being the father. Likewise, there  
28 are adopted, adopted children of only males, by men, by fathers. So it's gone beyond the  
29 concept of. In that sense...

30

31 **AISHWARYA BHATI:** I bow down.

32

33 **JUSTICE BHAT:** In that sense when the Constitution envisioned it. And some of this *parens*  
34 *patriae*, interestingly if you see the quotation of Lord Justice Lindley, he talked about  
35 husbands, guardians, and fathers. So that was a situation where women didn't have agency.  
36 Women were even seen as wards. So therefore, the question of guardianship was that with  
37 men. So it's an evolving you know...



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**AISHWARYA BHATI:** I bow down, My Lords, I bow down to what is falling from My Lords...

**JUSTICE BHAT:** And what is central to this, is unchanging, which is a welfare of the child.

**AISHWARYA BHATI:** Please, My Lords. So My Lords, my respectful submission would be that Your Lordships may see it from the perspective that this method of naturally born heterosexual couples bringing up their children is the ideal mode and the law in the entire regulation has provided for My Lords, children who do not have that. From that perspective, please see now My Lords, the aspect of adoption. I have given one example in para 13 of sponsorship, which is available to only widowed, divorced or abandoned mothers to seek sponsorship for their children that's the protection under Section 45. Specifically available only to this category of women My Lords. Then please see para 14. My respectful submission is adoption is not an alternate to biological birth. My respectful submission is that adoption is a mechanism to find...

**CHIEF JUSTICE CHANDRACHUD:** A law does recognize that you can adopt for a variety of reasons. You may adopt even though you are capable of biological birth. You can adopt if you don't want biological birth. There's no compulsion to have biological children. Therefore, our law does recognize the fact that there may be situations within this ideal of a cohabiting family with father and mother of a heterosexual gender family having their own biologically born children. But, that's not how our law is postulated also, right? What happens if suppose between the pendency, during the tenure of a heterosexual marriage, one of the spouses dies? Then the other spouse really assumes the character of a father and the mother, depending on... isn't it? So, that is something which our law recognizes.

**AISHWARYA BHATI:** My Lords, I bow down. The law recognizes again, from the perspective of the child. Your Lordships have held that there is no fundamental right of adoption.

**JUSTICE BHAT:** No, I think we may differ on that, because even if you go back to tradition, the right of a grandfather to take in adoption, the son of the daughter, what is classically known as one of the approved forms of... approved forms of, yes... having a child – Putrikaputra. So, that is a known notion. So, it is not that this is no sanction, it is hallowed. It's hallowed in tradition.

1 **AISHWARYA BHATI:** My Lords, I bow down.

2

3 **JUSTICE BHAT:** Therefore, to say this is an exception, may not be appropriate. Why do...  
4 why did... even in some schools, even grown women, widows are enabled to adopt. Why?  
5 There's another purpose there. And even, there are situations where adoptions take place, and  
6 thereafter, there is biological birth; that too happens. So, there are any number of situations  
7 where adoptions is the norm. But yes, you are right. But then, all this is serving to emphasize  
8 and heavily underline, that there is a normal, and these are exceptions.

9

10 **AISHWARYA BHATI:** My Lords, my respectful submission is not of exception. My  
11 endeavour is to present to Your Lordships, that all of this is crafted together from the  
12 perspective of child being at the core of it. It is not right that in your...

13

14 **CHIEF JUSTICE CHANDRACHUD:** But Ms. Bhati, that you need not labour at all.

15

16 **JUSTICE BHAT:** May not be. That may not be.

17

18 **CHIEF JUSTICE CHANDRACHUD:** The welfare of the child is paramount, obviously.

19

20 **JUSTICE BHAT:** Definitely.

21

22 **AISHWARYA BHATI:** So My Lords, adoption is... I want to show to Your Lordships...

23

24 **CHIEF JUSTICE CHANDRACHUD:** But, the means of realizing that welfare are  
25 numerous. The pathways are numerous

26

27 **AISHWARYA BHATI:** I bow down. I bow down. In fact, adoption...

28

29 **CHIEF JUSTICE CHANDRACHUD:** Some are matter of choices, some are matter of  
30 compulsion.

31

32 **AISHWARYA BHATI:** I bow down My Lords. And, the CARA guidelines...

33

34 **CHIEF JUSTICE CHANDRACHUD:** But, tell us one thing, in your case, that a right which  
35 is otherwise available to an individual to adopt a child, is taken away because that individual  
36 is in any relationship otherwise than a heterosexual marriage?

37

1 **AISHWARYA BHATI:** That is right My Lords, and that is not just true for adoption, that is  
2 true for assisted reproduction, which is now regulated by the assisted reproductive...

3

4 **CHIEF JUSTICE CHANDRACHUD:** If two people are in a live-in relationship, does that  
5 mean that therefore, because of the fact that the two people are in a live-in relationship, could  
6 be a heterosexual couple, that they will not have a right to adopt?

7

8 **AISHWARYA BHATI:** Not under the existing law My Lords. Not just adopt My Lords...

9

10 **CHIEF JUSTICE CHANDRACHUD:** But, is the right of one of them to adopt taken away  
11 because she or he is in a living relationship?

12

13 **AISHWARYA BHATI:** My Lords, one of them can adopt, but the only couple relationship  
14 that adoption can in surrogate reproduction.

15

16 **CHIEF JUSTICE CHANDRACHUD:** It is a heterosexual...

17

18 **AISHWARYA BHATI:** All three of them only recognize one kind of couple, that is, a  
19 heterosexual married couple.

20

21 **CHIEF JUSTICE CHANDRACHUD:** Therefore... no, no. But therefore, if two people... if a  
22 heterosexual couple is in a live-in relationship, one of them can certainly adopt? Or, is it  
23 CARA's case that we will deny you the right to adopt, because you are in a heterosexual live-in  
24 relationship?

25

26 **AISHWARYA BHATI:** No, My Lords. Permit me to show it to Your Lordships the CARA  
27 regulations.

28

29 **JUSTICE BHAT:** If I may paraphrase your argument, it is like this. The public policy  
30 consideration, which you are actually mooting or advocating, or rather saying, stating, is that  
31 yes, we allow adoptions by single, let's say, males, single females, in their capacity as single  
32 males or single females. But, the moment they enter into a... either a same-sex relationship or  
33 another kind of live-in relationship, that relationship is not per se recognised.

34

35 **AISHWARYA BHATI:** I bow down My Lords.

36

1 **JUSTICE BHAT:** So, the only recognition of a relationship of father and mother is where  
2 there is a...

3

4 **CHIEF JUSTICE CHANDRACHUD:** Heterosexual marriage.

5

6 **AISHWARYA BHATI:** My Lordships, please. And, that is true not just for adoption, but also  
7 ART Act...

8

9 **CHIEF JUSTICE CHANDRACHUD:** But my question is different. If people are in a live-  
10 in relationship, then is the right of an individual in a live-in relationship to adopt taken away  
11 by virtue of the fact that they're in a live-in relationship?

12

13 **AISHWARYA BHATI:** My Lords, they will not be... So only one parent can adopt as single  
14 mother or a single...

15

16 **CHIEF JUSTICE CHANDRACHUD:** Fair enough, that we've got. But, your circular says  
17 something to the contrary, because your circular says, that the moment you are in a live-in  
18 relationship, albeit in a same-sex relationship, then you cannot adopt even as a single  
19 individual.

20

21 **AISHWARYA BHATI:** I will quickly take Your Lordships through the architecture of  
22 the JJ Act.

23

24 **JUSTICE KOHLI:** Also, keep in mind one more fact Ms. Bhati. Besides the fact  
25 that Honourable the CHIEF JUSTICE has pointed out...

26

27 **MS BHATI:** Please, ma'am.

28

29 **JUSTICE KOHLI:** ...there is that condition. And what if... and that what if will be important,  
30 that somebody per se says, is that he or she is not in a living relationship. You probably have a  
31 format or something that a person has to sign or say this for you to satisfy yourself and  
32 subsequently does. Then what happens? Will the child be taken back?

33

34 **AISHWARYA BHATI:** There is provision for disruption and dissolution  
35 in adoption also. There My Lords, It is carefully crafted. Because, child who's adopted will  
36 become a child of that person for all purposes for inheritance....

37

1 **JUSTICE BHAT:** That's right.

2

3 **AISHWARYA BHATI:** ...for all other rights. So My Lords, it cannot allow this kind.... There  
4 can be no uncertainty in, My Lords in these matters when it considers....

5

6 **JUSTICE KOHLI:** So, this person, if he or she elects to adopt will for the rest of their life  
7 have to undertake that they will never be in a....

8

9 **MS BHATI:** No There is no undertaking like...

10

11 **JUSTICE KOHLI:** ....unless it's a case of actually marrying. Is the point that you are trying  
12 to put.

13

14 **MS BHATI:** No, My Lords. There is no undertaking. I will tell Your Lordships how they are  
15 constructed is that a heterosexual married couple has to also have two years of stable  
16 relationship of marriage before they can adopt. It's not like they can... and they have to have  
17 consent from each other.

18

19 **JUSTICE KOHLI:** And if it's a single parent?

20

21 **MS BHATI:** If it's a single parent, then there are other considerations. What is their age?  
22 What is the gender of the child? What is their gender? I want to quickly show  
23 to Your Lordships architecture under the JJ Act, the CARA... Compilation A, I have put all the  
24 three acts.

25

26 **JUSTICE KAUL:** Ms. Bhati, What I can get, what Sister is saying is, suppose there is a single  
27 adoption There is adoption by a single person. After a couple of years, child is being brought  
28 up by their parent and he decides, you can't guarantee the future what will happen, so he  
29 decides to have a say to begin with a live-in relationship. That's not a disqualification.

30

31 **AISHWARYA BHATI:** Not at all.

32

33 **JUSTICE KAUL:** It will be there. So, how do you explain this?

34

35 **AISHWARYA BHATI:** My Lords, I will quickly take 5 - 10 minutes and take Your  
36 Lordships through the architecture starting with the JJ Act.

37

1 **CHIEF JUSTICE CHANDRACHUD:** Ms. Bhati, we can recognize two points which you  
2 have made. One, if a couple wants to adopt a child, then our Adoption Regulatory Regime only  
3 recognizes the right to adopt when you are in a heterosexual marital relationship all right.  
4 That's your first point. We understand why and what the public policy underlying that is. That  
5 if you have to be a couple, if you have to be a My Lord and father, you must be necessary in a  
6 heterosexual marriage before you can both adopt a child as a couple, that's your first  
7 proposition. What we are asking you really is on something slightly different, which is  
8 nonetheless, our law recognizes the right of a single individual to adopt. And the question,  
9 therefore is, and we take it that proposition also, that the right of a single individual to adopt  
10 is not affected by the relationship which that single individual may otherwise have, whether  
11 it's in the nature of a live in relationship which is heterosexual or a live in or a relationship of  
12 a same sex so long as you are adopting as a single individual.

13

14 **MS. BHATI:** I bow down My Lords. That is my stated position. And My Lord, see, Your  
15 Lordships will appreciate that because the law...

16

17 **CHIEF JUSTICE CHANDRACHUD:** We could take it that even a same sex couple, or let  
18 me rephrase it... An individual in a same sex relationship is not precluded from adopting a  
19 child. We take that as CARA's statement of position....

20

21 **MS BHATI:** That is the mandate of Juvenile Justice Act. That is the mandate of...

22

23 **JUSTICE NARASIMHA:** If I may just make one more statement, you will agree with.  
24 A single parent, who adopts remains a single parent, there is no difficulty. The moment she  
25 enters into a matrimonial relationship, and it's a heterosexual relationship, then the husband  
26 becomes the father, adoptive father... like she's the adoptive mother. So, then the child as a  
27 consequence becomes the heir in the event of death to the properties of either and rather both.  
28 On the other hand, if the single parent enters into a sexual... same sex relationship then the  
29 adoptive child continues to be the adoptive child of that adoptive father or the mother, and no  
30 more. Full stop. This is your proposition. So, therefore, sorry, just to take one thought further,  
31 what you're driving at here is the stability. Because even in the event of disruption of the  
32 family, like in the case of marriage, there is a divorce... the relationship of an adoptive child  
33 continues. Whereas there is no, since there is no marriage and there is no marriage recognition  
34 that stability would be undermined if you recognize....

35

36 **AISHWARYA BHATI:** I bow down, My Lords I bow down to Your Lordships. My  
37 Lords Justice Narasimha, had a point. My Lords in fact CARA has a fast track method for step-

1 parent adoption also. It may happen that somebody has a natural born child and she becomes  
2 a divorcee or a widow, and she remarries so her child can be adopted. And there is a  
3 mechanism that is... My Lords, actually, it's very carefully crafted. We are a culture  
4 of Yashoda Mata and also Devki Mata. So both My Lords, one who gave birth and one who  
5 reared the child.

6

7 **JUSTICE NARASIMHA:** We will see those regulations. Perhaps there might not be  
8 anything formulated to say it's prohibited, but while hetero marriage might be recognized,  
9 same sex rules might not have provided any recognition. We'll have a look at those rules.

10

11 **AISHWARYA BHATI:** Actually, My Lords, that is why live-in is also not  
12 recognized. Because live-in also is what Mr. Sibal was mentioning yesterday, the within the  
13 concentric circle. The without is not recognized for live-in. Live-in are now recognized under  
14 the Domestic Violence Act, 120.

15

16 **CHIEF JUSTICE CHANDRACHUD:** So live-in couple cannot adopt a child as a couple.

17

18 **AISHWARYA BHATI:** Yes, because they can walk out of relationship anytime.

19

20 **CHIEF JUSTICE CHANDRACHUD:** Fair enough. Fair enough. We understand what the  
21 public policy precept underlying it is. But the existence of a live-in relationship does not  
22 prohibit one of the parties from seeking to adopt a child.

23

24 **AISHWARYA BHATI:** Yes, My Lords.

25

26 **CHIEF JUSTICE CHANDRACHUD:** As an individual.

27

28 **AISHWARYA BHATI:** Yes, My Lords.

29

30 **JUSTICE BHAT:** So you are looking at it from the perspective of the child, which is that the  
31 child is most benefited in every formation, at least there is one person responsible for  
32 that. That stability is what you are actually driving at. At the core of the...

33

34 **CHIEF JUSTICE CHANDRACHUD:** And the fact that one individual is adopted, that  
35 right to adopt, or the continuance of that adoption is not affected by any subsequent change  
36 in the marital status of that individual who has adopted.

37

1 **AISHWARYA BHATI:** Please My Lords. My Lords, in fact, the ART and Surrogacy Act, the  
2 validity of some provisions are being considered by Court 5. There are a clutch of petitions that  
3 have challenged some provisions and My Lords, there was a point that was sent to the National  
4 Board for reconsideration. There's a very well equipped National Board under  
5 ART and Surrogacy because they are also in a manner only recognizing this couple of  
6 heterosexual married couples as a relationship and single women are allowed under  
7 the ART and only widow and divorced women are allowed under surrogacy.

8

9 **CHIEF JUSTICE CHANDRACHUD:** Then Ms. Bhati, can we then summarize your  
10 submission in the following terms that just as there is no recognition, according to you today,  
11 the state of our law of a same sex marital relationship, which is legislatively  
12 recognized, parallely there is no recognition in our law today of the right of a same sex couple  
13 to adopt a child as a couple.

14

15 **AISHWARYA BHATI:** Yes, My Lords. I bow down My Lords.

16

17 **CHIEF JUSTICE CHANDRACHUD:** And that is based on the foundation that a child must  
18 have a stable family existence and which you postulate would exist in the case of a  
19 heterosexual marriage.

20

21 **AISHWARYA BHATI:** Would Your Lordships, just make a note of the sections that I am  
22 giving to Your Lordships? The Juvenile Justice Act. I wanted to show to Your Lordships it is  
23 at page 82 of my compilation A. I wanted to show chapter 8 to Your Lordships. And before  
24 that, I wanted to show some definitions and some general principles which are  
25 in Section 2 and Section 3. Those general principles are very, very critical from my  
26 perspective, because that is really....

27

28 **CHIEF JUSTICE CHANDRACHUD:** Provisions you want us to see?

29

30 **AISHWARYA BHATI:** I want to draw Your Lordships' attention to some definitions  
31 in Section 2 and general principles in Section 3.

32

33 **CHIEF JUSTICE CHANDRACHUD:** Which are the definitions Section 2?

34

35 **AISHWARYA BHATI:** My Lords, Definition sections.....There are actually there are three  
36 kinds of children who are available free for adoption. Abandoned child, orphaned child, or  
37 surrendered child.



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**JUSTICE KOHLI:** Which volume?

**JUSTICE BHAT:** 82 volume. Compilation 1 I think.

**AISHWARYA BHATI:** Compilation A My Lords, we are calling it. And Lordships will find it.

**JUSTICE BHAT:** Printed 87 actually,

**JUSTICE KOHLI:** Printed 87.

**AISHWARYA BHATI:** Yes. Page 82, it starts My Lords.

**JUSTICE BHAT:** Printed 87.

**CHIEF JUSTICE CHANDRACHUD:** Compilation? Which compilation?

**AISHWARYA BHATI:** Compilation A My Lords. Index. And 87 it starts My Lords. So these three definitions Your Lordships will note - Abandoned child 2(1). Then, please see a definition of Adoption itself. "Process through which adopted child is permanently separated from biological parents and becomes lawful child of adoptive parents with all rights, privileges, and responsibilities that are attached to a biological child. Best interest of the child, means the basis for any decision taken regarding child, to ensure fulfilment of his basic rights, needs, identity, social well-being, physical, emotional, intellectual development. Child means anyone below 18. Please see 15, 'child-friendly', 16 'child legally free for adoption'. Please now come down My Lords, to Orphan at 42. Section 2, sub-section 42, Orphan. Then My Lords, 49, 'prospective adoptive parents', same as 57. Now permit me to take Your Lordships.... A 'surrendered', Your Lordships will note, is 60. Section 2, sub-sections 60, is 'Surrendered Child'. And 'sponsorship', an example of which I gave, is defined at 58. The general principles My Lords, that are in Section 3, there are total 16 principles. They've been culled out from the United Nations Child Right Convention and My Lords, I want to highlight to Your Lordships, the aspect of, number one, presumption of innocence. The principle of best interest to develop full potential, principle of family responsibility, positive measures. And, I want to read this one My Lords. "All resources are mobilized, including those of family and community, for promoting well-being, facilitating development of identity, providing an inclusive and enabling environment to reduce vulnerabilities in children, and the need for intervention

1 under this Act". This Act is not to promote adoption. This Act is to make sure that there are  
2 less and less interventions under this Act.

3

4 **JUSTICE BHAT:** You are reading from Section 3?

5

6 **AISHWARYA BHATI:** Section 3. Principle 6, I placed.

7

8 **JUSTICE BHAT:** The 6th one, okay.

9

10 **AISHWARYA BHATI:** That's positive measures.

11

12 [NO AUDIO]

13

14 **AISHWARYA BHATI:** Your Lordships, will appreciate just reminding Your Lordships of X  
15 versus Union of India My Lords judgment that my colleagues have relied on. In fact, we were  
16 fortunate that Your Lordships gave us the privilege to assist Your Lordships in that. Medical  
17 termination of pregnancy is the border in our respectful submission, where the individual  
18 rights end. When it comes to My Lords, the child that's already born or unborn, in the case  
19 of ART and surrogacy, it's the welfare of child that alone is the underlying basic principle. So  
20 the parameters will be completely different. In Navtej, in X, in NALSA, Your Lordships were  
21 dealing with competing rights. Marriage as an institution with procreation being such a  
22 fundamental core to it. If Your Lordships read 'spouse' in the Special Marriage Act My Lords,  
23 it is going to have impact My Lords, the policy and trick. Spider webs.

24

25 **CHIEF JUSTICE CHANDRACHUD:** That has been already argued...

26

27 **AISHWARYA BHATI:** It's going to impact the children laws the most in ways that we can't  
28 even fathom today. Because children need that certainty of love, that conformity, My Lords.  
29 And the only reason why any other relationship, though there are other kinds of relationships  
30 which are recognized in other laws .....

31

32 [NO AUDIO]

33

34 **AISHWARYA BHATI:** Go to great lengths to protect their children from when they can  
35 vote, when they can marry, when they can drink, when they can.... And My Lords the right of  
36 repudiation, the right of non-waiver of rights. These are the principles on which they have all  
37 been founded. The right to a fresh start, The POCSO Act... the entire architecture... Consent is

1 immaterial. An independent thought, Your Lordship said is even a minor spouse would be  
2 covered. The entire architecture of Your Lordship's judgments and the statutes has been from  
3 the prism of the child and none other. My Lords, it's not in my compilation, but there is some  
4 lines from Justice Bhagwati in the judgment of Lakshmikant Pandey versus Union of India.  
5 This is 1984, 2 SCC, 244. Just want to read two lines to Your Lordships, My Lords, this is the  
6 judgment where Your Lordships were dealing with the problems of intercountry adoption and  
7 the entire infrastructure, the entire regime of Juvenile Justice Act and CARA came by virtue  
8 of Your Lordships nudge and push in this judgment My Lords. Para 6 just two lines I want to  
9 read to Your Lordships, My Lords.

10

11 **JUSTICE BHAT:** Then aren't you serving the petitioner's cause by pointing to this vacuum  
12 and what this court did?

13

14 **MS BHATI:** My Lords, my respectful submission is, Your Lordship may go the slowest when  
15 it comes to rights of child. My Lords, para 6 just two lines. My Lord, I'm sorry, My Lords. I'll  
16 just read... They are just two lines, My Lords. Justice Kaul, may kindly bear with me My  
17 Lords. This is 1984, 2 SCC, 244 para 6. Just two lines My Lords. It is obvious that in a civilized  
18 society the importance of child welfare cannot be overemphasized because the welfare of entire  
19 community, its growth and development depends on the health and well-being of  
20 children. Children are a supremely important national asset. And the future wellbeing of the  
21 nation depends on how its children grow and develop. The great poet Milton put it admirably,  
22 and he said 'child shows a man as morning shows the day'. And study team of Social Welfare  
23 said much to the same effect when it said physical and mental health of a nation is determined  
24 largely by the manner in which it is shaped in the early stages. Just that My Lords.

25

26 **JUSTICE BHAT:** This is well taken, but you must show children in the context of same sex.

27

28 **AISHWARYA BHATI:** My respectful submission is from the perspective to show to  
29 Your Lordship that this architecture is carefully crafted. My Lords, here heterosexual couples  
30 also don't have rights that equate to them. There are categories within categories created. Man  
31 and woman don't have same rights. A single man and a single woman do not have same  
32 rights. So from that perspective, there is no... In fact, the only recognition is to the  
33 child's right. In fact, when I'll show to Your Lordships. Your Lordships saw that Section 3 with  
34 me. Then please come to straightaway Chapter 8 of the Juvenile Justice Act.

35

36 **CHIEF JUSTICE CHANDRACHUD:** Ms. Bhati, since we had given you 30  
37 minutes and you are already now 45.

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**AISHWARYA BHATI:** I'm sorry.

**CHIEF JUSTICE CHANDRACHUD:** No, no, not at all. You made a very valid point and you never... everything that you say is always very precise and full of substance. So just formulate your submission so that you know...forget the submission. We will read the submissions, of course. But if you can just formulate it so that then we can take it down and then we can focus on.

**AISHWARYA BHATI:** Lordships may go through only my note. Just Part B is the portion that I've dealt with. I'm just going to quickly tell Your Lordships...

**CHIEF JUSTICE CHANDRACHUD:** If you can just highlight what are the key areas. Because I think now we've seen the broad architecture, etc. of the law that you have showed us. You can formulate three or four key submissions, and then we can...

**AISHWARYA BHATI:** My Lords may note in the CARA Adoption Guidelines, the latest ones are of 23rd September '22. That's at page 2 to 8 in this compilation A.

**CHIEF JUSTICE CHANDRACHUD:** One second. Let's just take it one second.

**AISHWARYA BHATI:** 2 to 8 My Lords.

**JUSTICE KOHLI:** 23rd September?

**AISHWARYA BHATI:** My Lords, this is 23rd September '22. These are the latest guidelines, but I have put the old guidelines of 2017 also and there are very little changes. The architecture continues in the same manner.

**JUSTICE KOHLI:** Ms. Bhati, what page did you say?

**AISHWARYA BHATI:** This is page 228. In Compilation A.

**JUSTICE KOHLI:** Compilation A.

**AISHWARYA BHATI:** And Your Lordships will pay close attention. In my respectful submission to the general principles governing adoption. Regulation 3, Regulation 4.

1 'Child eligible for adoption' My Lords this OM that came was from Steering Committee  
2 discussions. One point that was put was that child is trans. How is he dealt with  
3 in CARA guidelines? CARA guidelines make no distinction, what is the gender of the  
4 child, what is the disability of the child if any, what is the... what age of... age... so protection  
5 is given only on two occasions. What is the age on which it is given. So Lordships will have a  
6 quick look at Regulation 5. That gives My Lords, Regulation 4 gives child who is fit for adoption  
7 and Regulation 5 gives eligibility of adoptive parents. That's at page 230 My  
8 Lords. Your Lordships will see that man woman relationships are immaterial. So a man  
9 cannot adopt a young girl child. And it is in this manner, that it has been crafted. Then two  
10 years of stable married relationship is extremely critical. That Your Lordships will find in  
11 Regulation 5. I also want to draw Your Lordships' attention to 'Seniority' in Regulation 44  
12 and 'Root Search' in Regulation 47. My Lords seniority, Your Lordships will find...

13

14 **JUSTICE KOHLI:** Sorry, Regulation 44 and?

15

16 **AISHWARYA BHATI:** Regulation 44 deals with seniority of prospective adoptive parents.

17

18 **JUSTICE KOHLI:** And?

19

20 **AISHWARYA BHATI:** And My Lords Regulation 47 deals with Root Search. So every child  
21 is entitled to a root search. Adopted child also. When either if he becomes a major, he's entitled  
22 to do that on his own or through his adoptive parents. And My Lords, in the entire  
23 architecture, only at one place, the biological parents' rights is protected. That is regulation  
24 47, sub-regulation 6, where it says that the right of an adopted child shall not infringe the right  
25 of privacy of biological parents. This is the only place. So, if biological parents wish to.. wish  
26 their privacy to be protected, then this root search will not be given. I've given in yesterday's  
27 compilation a flow chart of how adoptions happens. I have given a data also. In fact I took  
28 from CARA data. Your Lordships will find that at page 1 of my yesterday's compilation,  
29 roughly My Lords, I've given gender wise. How many boys, how many girls for the last 8-  
30 9 years? How many have been given up in adoption? How many parents have registered? So  
31 roughly to give Your Lordships an idea there are about 30,000 parents who are registered.  
32 Prospective adoptive parents waiting for adoption. And the children, My Lords, who are in the  
33 pool, are less than 1500. There is a mechanism for, My Lords... You have to reserve every  
34 prospective... and then My Lords, there is a mechanism for inter-country, intra-country is the  
35 last resort.

36

1 **CHIEF JUSTICE CHANDRACHUD:** Only 1,500 children are available for adoption across  
2 India?

3

4 **AISHWARYA BHATI:** My Lords, yes, and not yet available. They are in the pool, because  
5 there is a time period that's available for children who have surrendered. Their biological  
6 mothers, or parents can reconsider if they want to... So there is a mechanism that is laid down  
7 My Lords, and then they are put in the... My Lords, I've given a flowchart also of how adoption  
8 happens. It is only through Carings portal. No interference by humans. It is a portal that is  
9 automated completely. The option goes to the next in seniority as prospective adoptive  
10 parents. They are given 48 hours. They have to give their ethnic background, their choice,  
11 gender choice. My Lords, the home study firm that's scheduled in these regulations is so  
12 exhaustive, you have to disclose not just your health conditions, income, your parents, your  
13 other family members, your children... My Lords, it is so comprehensive that... because it is  
14 important! Where the child is... because there is a process of matching that has to happen.  
15 After the parent decides that this child might be fit, there is a matching that has to happen,  
16 and it's only after that matching, that the child is, My Lords, given.

17

18 **JUSTICE KOHLI:** Just a question, out of curiosity. We appreciate how much effort is gone  
19 into ensuring that the child is safeguarded in every which way when he or she goes to a home.  
20 What is the timeline ordinarily for an application once party applies, parent to be applies, and  
21 it matures by actually handing over the child to that adoptive parent?

22

23 **AISHWARYA BHATI:** I've given that in my...

24

25 **JUSTICE BHAT:** Do we have data? Do we have data of neglected children who are in care  
26 institutions, and who are, of course, not adopted. And who, after turning 18, go? I Mean,  
27 I won't use the word 'turned in', because care institutions don't cater to any adult. At the age  
28 of 18, if the child is not adopted or not cared for, in the sense that there is nobody to sponsor  
29 her or him, and he becomes an adult.

30

31 **AISHWARYA BHATI:** Yes, My Lords.

32

33 **JUSTICE BHAT:** What is the future of that young adult who was a child till then? They  
34 have... I mean, there is no data. Actually, there is no data. And if you say 30,000 applicants  
35 are waiting...

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37 **AISHWARYA BHATI:** Of prospective parents.

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**JUSTICE BHAT:** Of prospective parents are... then 1,500 only are available?

**AISHWARYA BHATI:** Yes.

**JUSTICE BHAT:** Isn't it a matter for concern, that we look into every care institution? And there are thousands. We have at least, in Delhi itself, more than 50. In Tamil Nadu we have I think, 250 or so.

**AISHWARYA BHATI:** My Lords, this is the data of.... If Your Lordships will see page 2 of my yesterday's compilation of Legally Free Children available as on 28 April, 2023. The CARA guidelines prescribe a procedure in which the child has to be declared 'free for adoption'. It's a very razor-thin edge walk, My Lords. The child is being separated from biological parents, surrendered parents or orphan, My Lords. Orphan also, My Lords, there is a provision for family adoption, because our culture... we are polycentric even in families. There will be nani, dadi, masi, mama, buas, whole lot My Lords, and they have right of, accelerated rights of adoption for family members. So, there is the whole process. If the process is not followed for declaring the child legally free first, before giving up in adoption, it is going to...

I just want to quickly, My Lords, just tell Your Lordships what the rest of my note is. Your Lordships, will just see that... I have also adverted to, in between, the ART and the surrogacy mechanism is also like that. I just quickly want to mention this My Lords. The National Board of Surrogacy and ART. They were referred some issues, that why are you not allowing donor gametes in a surrogacy? My Lords, the answer very clearly that has come from them is, emotional bond of the child is very important. We can't even take 1% chance. So, they say between the egg, the sperm and the uterus, at least two of them have to be of biological parents. So, while ART allows donors, surrogacy, where you are using the uterus or womb of another woman, altruistic, no commercial, because now the regulation is very clear, you can't use donors. Though My Lords, Court 5 will deal with those challenges, but the reasoning that has come is that, there has to be a strong emotional bond of the parents who are going for these assisted mechanisms. My Lords, we have given... I think I've covered most of it.

I would draw Your Lordship's attention to mala's one more aspect the special provisions with regard to children... to women My Lords, is also something that Your Lordships will have to look at very carefully. We have made a compilation of My Lords... laws where women are protected by virtue of their marriage or domestic relationship.

1 **CHIEF JUSTICE CHANDRACHUD:** Thank you, Ms. Bhati.

2

3 **MS BHATI:** One more thing. We made a chart of these 34 countries, which have in some  
4 manner recognized their civil unions, though it's a phenomena only of this millennium My  
5 Lords, but they have recognized. We made a chart My Lords. We've given a source of  
6 that also. 27 of them have gender neutral rape laws. Social fabric is different My Lords. That  
7 chart Your Lordships will find My Lords in our compilation C, at page 1492. The source is also  
8 there. 27 countries gender neutral, four are gendered, three we could not confirm because they  
9 were in languages. Though we tried AI of the internet to get the sources. My Lords, I'm very  
10 grateful to Your Lordships. I had just written an opening line if Your Lordships will permit, I'll  
11 read it My Lords, at my closing. The entire endeavour of ours is to present to Your Lordships  
12 that the architecture of child-centric or child welfare laws is very carefully crafted, with welfare  
13 of child being paramount. Any general declaration reading in spouse instead of husband and  
14 wife, will make laws relating to adoption, assisted reproduction, surrogate reproduction  
15 completely unworkable. Even for the Legislature, which has the tools of wide consultation,  
16 expert and specialist advice, options of calibrated and gradual resolutions, opportunities of  
17 amendment, savings and repeal, that to my mind, is a very, very important tool. The option of  
18 adoption, savings and repeal. They will also find it very onerous responsibility to balance, on  
19 one hand the competing rights and on the one hand, protecting the  
20 *parens patriae* responsibility of the welfare of the child because that is non negotiable.

21

22 **CHIEF JUSTICE CHANDRACHUD:** All right, thank you, Ms. Bhati. Thank you.

23

24 **MS BHATI:** I am very grateful My Lords, Your Lordships Have given me this opportunity.

25

26 **CHIEF JUSTICE CHANDRACHUD:** Yes. Mr. Manindar Singh.

27

28 **MANINDAR SINGH:** Only a couple of minutes, because the written submissions are  
29 already filed. If Your Lordship kindly have the written submissions, coupled with the small  
30 compilation of judgments My Lords, which are in our name. Because I tried to find out  
31 the PDF number. I was instructed...

32

33 **CHIEF JUSTICE CHANDRACHUD:** We have the written subject,

34

35 **MANINDAR SINGH:** Yes My Lords. Now I have only two points to make in support of the  
36 same submission.

37



1 **CHIEF JUSTICE CHANDRACHUD:** What are the two points?

2

3 **MANINDAR SINGH:** First of all on the point that under Section 4 of the Special  
4 Marriage Act, by virtue of by process of interpretation My Lords, it may not be permissible for  
5 recognition of same sex marriages.

6

7 **CHIEF JUSTICE CHANDRACHUD:** Just one second. Yes.

8

9 **MANINDAR SINGH:** Under Section 4 of the Special Marriages Act, all sub-clauses are  
10 conditioned in addition, I don't want to repeat,...

11

12 **CHIEF JUSTICE CHANDRACHUD:** What is the second point?

13

14 **MANINDAR SINGH:** Second point is on that, as late as 2022, I have placed 3-4 judgments  
15 of your... My Lords, of the different courts, which My Lord, two are privy council and one is  
16 from Hong Kong, where two out of the three judgments, where similar rights had been  
17 claimed, My Lords, were declined, and in one of the judgment constitutional validity of  
18 declining this right, such a claim which was placed before the Court My Lords  
19 was rejected. That is the provision we say no there would not be any recognition to same sex  
20 marriage, which was put in question on constitutionality is declined. My Lords,  
21 if Your Lordships will just have a look at the small note I'll just show Your Lordship the  
22 provision.

23

24 **JUSTICE BHAT:** The provision like that 'DOMA'. The DOMA. DOMA was struck  
25 down. Here you say, " DOMA is upheld."

26

27 **MANINDAR SINGH:** Yes Your Lordship is right.

28

29 **CHIEF JUSTICE CHANDRACHUD:** Page 18 of your submission.

30

31 **MANINDAR SINGH:** Yes. If Your Lordship may just give me... only make a note My Lord in  
32 para 14 we have also relied on Section 112 of the Indian Evidence Act, in support of the first  
33 submission. And then, if Your Lordships come to para 16 which is extremely important.

34

35 **CHIEF JUSTICE CHANDRACHUD:** 16?

36

1 **MANINDAR SINGH:** Yes, 16 at page 7, where three per provisions of three personal laws  
2 My Lords, where there is that ability to procreate, which is one of the condition in Section 4,  
3 is a ground for divorce. In all the three personal laws of Hindus, Christians, and Muslims,  
4 which is mentioned in para 16. And then My Lords, if Your Lordships rightly pointing  
5 out <NO AUDIO>

6  
7 **CHIEF JUSTICE CHANDRACHUD:** Where are those foreign cases you wanted to show?  
8

9 **MANINDAR SINGH:** Yes, page 19 bottom. The Italian Constitutional Court, My  
10 Lord, where the Article 29 of that constitution which is reproduced at page 11 of  
11 the note because the reference is made earlier. Just make a note of My Lord Article 29, which  
12 was very wide, much wider than Section 4 of our Act.

13

14 **JUSTICE KOHLI:** Article 29 where Mr....?  
15

16 **MANINDAR SINGH:** If Your Lordships may kindly see page 11, page 11 of the note.  
17

18

19 **JUSTICE KOHLI:** Right.  
20

21

22 **JUSTICE BHAT:** Para 21.  
23

24

25 **JUSTICE KOHLI:** Okay. Thank you.  
26

27

28 **MANINDAR SINGH:** Page 11 of the note My Lord.  
29

30

31 **JUSTICE BHAT:** This is that Oliari. The judgment of....  
32

33

34 **MANINDAR SINGH:** Yes My Lord. Para 21, Article 29. If Your Lordships kindly see the  
35 second part of it.

36 'Marriage is based on the moral and legal equality of spouses.' So, by repressing this  
37 word 'spouses' and the right was claimed, that is declined at bottom, page 19 bottom going up  
to the next page. Kindly see para 31 and if Your Lordship permit me, kindly come to 20 and  
21 extremely relevant. And Your Lordship may also keep two things in mind. The argument of  
discrimination and classification which Mr. Dwivedi had also addressed, I don't want to  
add. And the benefits to flow from such recognition, which an argument raised here also. Both  
the arguments raised. Both are taken up squarely, directly and debated, considered and  
declined.

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**CHIEF JUSTICE CHANDRACHUD:** You cited Oliari as well.

**MANINDAR SINGH:** Yes My Lord. And Your Lordships have considered only Oliari in Navtej's judgment. But if Your Lordships may kindly...

**CHIEF JUSTICE CHANDRACHUD:** Para 34 is your privy council judgment.

**MANINDAR SINGH:** Yeah. And privy council, in one of the judgment, My Lord, just give me a moment.

**CHIEF JUSTICE CHANDRACHUD:** of <UNCLEAR>

**MANINDAR SINGH:** Page 21, last two paragraphs above 32. Both the grounds of discrimination and other benefits which flow from such a legal recognition of marriage have been considered. And if Your Lordships kindly come to 22. This is para 34 is the first judgment of 2022 in by the privy council where Section 14(1) of Bill of Rights was, which is reproduced in para 34, and then consideration thereof is up to page 24 of my note and which was rejected. Kindly come to para 36, which is at Section 53 of Domestic Partnership Act, which created a prohibition against such a recognition. It's extremely important for Your Lordship's kind consideration. The Domestic Partnership Act of 2018, where Section 53 created a prohibition. The constitutional validity was challenged and after consideration at para 76 and 77 of that judgment, which is reproduced at page 24 and 25. It is rejected in Hong Kong, which is para 37 which is also 2022. A similar discussion has taken place. Similar contentions have been considered. And if Your Lordships kindly come to page 27, para 77. I'll just read para 77. Your Lordship may kindly have regard to the other portion and I have placed the judgment copy also in the second compilation. Kindly come to para 77.

'In terms of access to the institution of marriage, it concerned the special status of marriage, which is a distinct concept from the benefit arising from it. The difficulty or even perceived hardship involved in obtaining the benefits of means of legal challenges does not justify a shortcut bypassing BL 37 which is Basic Law 37....

**CHIEF JUSTICE CHANDRACHUD:** All right, Mr. Manindar Singh. Thank you.

**MANINDAR SINGH:** Thank you, My Lord. And judgments are enclosed, the full text of the judgment have placed My Lord. I'm deeply obliged My Lord.

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**CHIEF JUSTICE CHANDRACHUD:** Thank you, Mr. Manindar Singh.

**ATMARAM NADKARNI:** I appear for the Akhil Bhartiya Sant Samiti. I'm not going to repeat anything, My Lord, most of the points are already covered. In fact, I am adopting all the points. I've already filed written submissions. Only two points I wish to highlight. (a) The concept of marriage in the Indian society is creation of an institution. For example, in the Hindu Law, it's a sacrament. In Muslim law, it's a contract.

**CHIEF JUSTICE CHANDRACHUD:** The concept of marriage in Indian society is?

**ATMARAM NADKARNI:** Is an institution by itself. Whether in Hindu Law it's a sacrament, so it is a divine angle. In the Mohammedan Law, My Lord, it's a contract. Now various facets. Now My Lord, concept of same-sex marriage, therefore, would be virtually like an attack on the very institution of marriage, which has been traditionally known in this country. And My Lord, we have to be very clear about it. There is no doubt, there is no doubt that Navtej recognizes the Right to Privacy. My Lord, Right to Privacy is recognized, but Your Lordships have seen that observation where they have said, by this, we don't mean the marriage. It's the union, right? The second point My Lord... the second point that I want to tell Your Lordships is, if Your Lordships have a look at Sections 19, 20, 21A of the Special Marriage Act, My Lord, if you marry under this law, Special Marriage Act, then it's not connected to the Hindu Marriage Act. But, it also provides that two Hindus can marry. Now, if two male Hindus or two female Hindus marry thereafter, what implications it's going to have on the other law, that also is required to be seen. Creating My Lord, a mere civil union is fine. Therefore, there would be no problem about a civil union or a declaration, that they need not be harassed or... because the prohibition part is a different aspect. But creating an institution of marriage itself, giving them all other rights, My Lord, will interfere with all other...

[NO AUDIO]

**CHIEF JUSTICE CHANDRACHUD:** Yes. So you are saying that there is no problem with the civil declaration of a civil union per se but...

**ATMARAM NADKARNI:** Civil union, and that already has been given in the Right to Privacy. By privacy you may, My Lord...in fact, in my written submissions I've highlighted and I've said so, that declaration of civil union is a different thing. But insofar as creating them as an institution of marriage, will be virtually... and number two My Lord, India as a country, one

1 has to see... like Roscoe Pound said, “Law is a concept of social engineering”. It has to keep....  
2 But India has not My Lord, reached that level, where this institution of marriage can be  
3 permitted at this stage. The rest of it, Your Lordships would get in my written submissions.  
4 I'm not troubling, because there are other lawyers also who are...

5

6 **CHIEF JUSTICE CHANDRACHUD:** Thank you. Thank you Mr. Nadkarni.

7

8 **ATMARAM NADKARNI:** I'm obliged. Grateful to My Lords.

9

10 **CHIEF JUSTICE CHANDRACHUD:** Mr. Sai Deepak, will argue now? Or Mr... who will?  
11 Manisha will argue after this.

12

13 **MANISHA LAVKUMAR:** My Lord, the state has filed an intervention application seeking  
14 to respond to various petitions playing inter alia for a judgment and... judgment declaring the  
15 marriage between persons belonging to the LGBTQI community, as legally valid in the context  
16 of the Special Marriage Act and the Hindu Marriage Act. My Lords, Ladyship, I've had the  
17 privilege of hearing the arguments of the Attorney General, the learned Solicitor General, and  
18 other counsels preceding me. I'll abide by the two regulations circumscribed by the  
19 Honourable Court. One being, the time constraint, the other being, not reading out any  
20 judgments. I've formulated a few points for consideration of the Honourable Court. But even  
21 those My Lord, I shall not be going into in detail. Let me just briefly...

22

23 **CHIEF JUSTICE CHANDRACHUD:** Can you formulate that Ms. Lavkumar, so we can...

24

25 **MANISHA LAVKUMAR:** I've formulated them. I'll just briefly read it. There's only one  
26 point on which I propose to take the Honourable Court, My Lord. My four points which I've  
27 formulated relate to reading up, reading down, updation of the existing law governing  
28 marriage, especially the SMA, to include non-heteronormative unions, would lead to altering  
29 of the cultural edifice. My Lords, substantially, already dealt with by the other counsels; I  
30 wouldn't delve any further into it. Necessity for a wide consultative process and comprehensive  
31 deliberation by the legislation, also has been extensively dealt with, by the Learned Solicitor  
32 General. This is what I wish to further highlight, this and the next point. 'It is not a case of  
33 exclusion or prohibition, but a case of non-inclusion in a targeted legislation, enacted with  
34 special aims and objects'. And taking this further from the deliberations, 'As transpired in the  
35 Court yesterday, tracing any right of recognition by whatever name called, within or outside  
36 the framework of matrimonial laws would result in a creation of a new institution  
37 de hors the democratic process. The inevitable ripple effect on numerous legislations and of

1 course, submissions with regard to the Foreign Marriage Act would get covered in the  
2 submissions already made with regard to the SMA. If time permitting, I'll make a two minute  
3 submission on that.

4

5 Marriage as a socially recognized institution and the foundation of the Indian Family Unit, I  
6 wish to submit that it is marriage between a man and a woman is at the core of the family. The  
7 Indian Society is founded and organized around this concept of the family. The rules of  
8 marriage continue to evolve, but they remain grounded in organizing of heterosexual  
9 relationships. The interest of the state considering the importance of this institution, the  
10 interest of the State in regulating of marriage is... lies in the overarching interest to preserve  
11 social order, ensure progression of society in a legitimate manner and to regulate matrimonial  
12 conduct. In that sense My Lord, marriage as a legal institution is not a private affair between  
13 consenting adults. It is a public act between two consenting adults who are then conferred a  
14 legal status by the State upon fulfilment of statutory requirements. I then point out, would  
15 point out that the SMA is part of a wider spectrum of all enactments relating to what we may  
16 be broadly calling Matrimonial Laws, whether in the realm of Personal Laws, whether FMA,  
17 whether SMA all are heteronormative in structure. I have excerpted by way of a table, that all  
18 these laws carry certain features which would be considered as the core fundamentals or the  
19 thrust of the Legislature. Namely, all of them refer to as heterosexual unions, all of them  
20 prescribe monogamy, all of them prescribe minimum age of marrying, and all of them carry  
21 prescriptions of prohibited degrees. They may vary from legislation, to legislation, but all of  
22 them are uniform in that sense. My Lords, the fundamental of marriage... Marriage before My  
23 Lords, is a matter which has very serious consequences in terms of its depth and breadth.  
24 Considering that My Lords are examining not just the validity of an Act, namely, the SMA or  
25 the FMA, My Lords are examining the very edifice of family institution, social structure,  
26 myriad of matrimonial enactments. And based on those myriad of matrimonial  
27 enactments, My Lords have succession enactments, divorce provisions, maintenance  
28 provisions, adoption, and maintenance. So it's an entire regime which is regulated. And all of  
29 which is based on heteronomical. So it is an entire regime. Looking at the act in isolation would  
30 not be possible, considering that it is all on the same platform. All heteronomous, all with these  
31 embargoes, all having regulatory nature and all on the same platform. And built on this is  
32 entirely a regime of other enactments and more importantly, social legislation, benevolent  
33 legislation, namely, for Evidence Act, 113(A), presumption or dowry death.  
34 Presumption 113 (B). Or dowry that act itself, Streedhan under the Hindu Marriage Act  
35 Section 8, so there is an entire edifice, which has been created... which is created around the  
36 institution of marriage.

37

1 **JUSTICE BHAT:** You may read para 6 if you don't mind. Page 11 of your Note.

2

3 **MANISHA LAVKUMAR:** The rules of marriage continue to evolve, but they remain  
4 grounded...

5

6 **JUSTICE BHAT:** Sorry, this is para 6 of page 11, social institutions. After the chart... the  
7 chart which you have given,... the two pages later. This is part of sub para 3. Yes. Please read  
8 that.

9

10 **MANISHA LAVKUMAR:** The institution of marriage.

11

12 **JUSTICE BHAT:** Social institution...

13

14 **JUSTICE KOHLI:** It's PDF 13, printed 11. 46 pages paper book.

15

16 **MANISHA LAVKUMAR:** Give me my compilation from there

17 'Social institutions consist largely of interlocking set of ideas that regulate or affect the way  
18 people actually understand and behave across interpersonal relationships, the meaning of  
19 social institution matters, and the institutions that bear it, serve to structure our experiences  
20 and steer them in a particular direction. They define our goals, focus our attention on those  
21 goals, and direct us towards them. Changing the public meaning of a social institution leads to  
22 changing the institution itself. The concept of same sex marriage is not within the percept of  
23 Indian personal law and legislation.' Obligated.

24

25 So, My Lord, I have pointed out that the rules of marriage may continue to evolve and they  
26 need must, but they continue to remain grounded in organizing heterosexual relationships.  
27 We have additional grounds for divorce being conferred. Over a period of time My Lord, even  
28 21(a) seems to be is enacted in the provisions of the SMA to ensure that now Hindu laws  
29 relating to succession, etc. would be made applicable and they must evolve. But the normative  
30 structure still remains heterosexual. Taking further from that, over and above the interest of  
31 the State in regulating, I wish to point out to the Honourable Court the argument at which the  
32 deliberation rested yesterday was with regard to tracing any right with regard to cohabitation  
33 into Article 21, as expounded in Navtej. So, Navtej has already granted them the right to  
34 cohabit physically, emotionally, sexually unfettered. My submission is that contemplating  
35 tracing of any right of any legal recognition of the right to cohabit would amount to creating a  
36 new institution outside the legal framework. An endeavour was made to read the SMA in a  
37 gender neutral manner, and the Honourable Court went through elaborately provisions as

1 contained in Section 4(c). Provisions as contained in 4(d). 4(c) was with regard to age reading  
2 in a gender neutral manner, age. For male, it was 21 years. Female, it was 18 years. As sought  
3 to be made applicable to gays? Possibly yes. To lesbians? Yes. But they are not representative  
4 of the entire community. LGBTQIA... so there are...

5

6 **JUSTICE BHAT:** You've used a very interesting expression juxtaposing the argument of the  
7 petitioners to the bouquet of rights. You call this as the sanctification.

8

9 **MANISHA LAVKUMAR:** That's right.

10

11 **JUSTICE BHAT:** A sanctification narrative. Could you just explain this in two minutes?  
12 What do you mean by the sanctification narrative in the context of heterosexual relationships,  
13 heterosexual marriages?

14

15 **MANISHA LAVKUMAR:** My Lords, my submission is that this principle of sanctification  
16 lies in the fact that the institution of marriage predated any legislation. Legislation recognized  
17 this social, cultural, pluralistic acceptance of this heterosexual union across societies,  
18 communities and regulated it. Regulated it in a manner that was most beneficial to public  
19 order, sustainability, procreation, ensuring the best upbringing of children. And the  
20 regulation does not end at marriage. The enactment provides not only entry points also exit  
21 points. The manner in which you exit. An organized manner, grounds for  
22 divorce, maintenance, who gets responsibility for it. So this is an entire genre My Lord, a  
23 regime created. Now recognition, the petitioners endeavoured to look into this SMA as well as  
24 the FMA and read it in gender neutral manner. Hypothetically just taking the example of  
25 prohibited relationships under Section 4(d).

26

27 My Lords, under 4(d)... My Lords, I need to make one important submission. If My Lords be  
28 pleased to turn to my note, which I forwarded yesterday. I wish to hurriedly go through that.  
29 I'll take five more minutes. My Lords, it's a five-page note mailed yesterday.

30

31 **CHIEF JUSTICE CHANDRACHUD:** Yes.

32

33 **MANISHA LAVKUMAR:** My Lord, Part 3, 'Consequences of any declaration...'

34

35 **JUSTICE KOHLI:** Sorry, Ms. Lavkumar, there is a five... there is a nine-page...

36



1 **MANISHA LAVKUMAR:** Nine-page note, I stand corrected. It's a nine-page note. I'm only  
2 going on part 3, that's all I wish to read. My Lord, It would be page 3. Page number 3, part 3.

3

4 **CHIEF JUSTICE CHANDRACHUD:** Yes.

5

6 **MANISHA LAVKUMAR:** My Lord, any declaration from this Honourable Court, would  
7 have very serious ramifications. The edifice of matrimonial laws and ancillary laws are  
8 extremely regulated. Sans any regulatory regime, a judicial recognition would create serious  
9 social and legal issues. My Lords, please do note, Section 4 had a bunch of regulations - age  
10 prescription, prohibition related, prohibited relationships, bigamy, etc. Any recognition would  
11 become a law within the meaning of Article 141, and it would be binding on the entire judiciary  
12 and plethora of litigations would come seeking recognition. But, de hors this regulatory  
13 regime... tomorrow My Lord, Navtej only talks of consenting adults. What about prohibited  
14 relationships? What about Bigamy? There is no regulatory regime. Any recognition de hors this  
15 regulatory regime, would have serious consequences. I also point out, that Entry 5, List 3 of  
16 Schedule 5... Schedule 7, empowers the legislature to enact laws with regard to marriage,  
17 divorce, adoption, wills, etc. This Court My Lord, ordinarily would not arrogate it to itself, the  
18 law-making prerogative. My Lord, it is further submitted, that the petitioner's apprehension  
19 is completely misconceived that the Parliament would not look into it.

20

21 **CHIEF JUSTICE CHANDRACHUD:** Yes.

22

23 **MANISHA LAVKUMAR:** My Lord, the apprehension of the petitioners in seeking  
24 recognition of, either marriage, a relationship akin to marriage, or by any name called, is  
25 misconceived on the ground that the legislature would decline to examine the concerns of the  
26 entire community seeking legal recognition, within the members of such community. And it is  
27 only this Honourable Court, which would declare. My submission, this is a circuitous route.  
28 Ordinarily, the Honourable Court would leave it to the Parliament. It has various multifaceted  
29 dimensions, all to be deliberated, social consensus, a large number of debates and conflicting  
30 views; those adversarial views are important to evolve a consensus on this issue, when to be  
31 done, how to be done, rather than go to the Parliament. The first endeavour was read into the  
32 SMA. When not fitting into the structure of the SMA, now seek a declaration apart from the  
33 SMA, which would have even more serious ramifications. And all arguments which are made  
34 applicable in the context of SMA, would be equally applicable My Lord, in this context. Would  
35 My Lords now turn to para 20?

36

37 **CHIEF JUSTICE CHANDRACHUD:** I think we'll close it here, Ms...

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**MANISHA LAVKUMAR:** Just one submission My Lord.

**CHIEF JUSTICE CHANDRACHUD:** Yes.

**MANISHA LAVKUMAR:** By giving a declaration of the nature contemplated, this Honourable Court would unintentionally be foreclosing debates in society, foreclose the rights of society...

**CHIEF JUSTICE CHANDRACHUD:** That we have seen.

**MANISHA LAVKUMAR:** And My Lords, such a declaration... Finally, My Lord, such a declaration would hamper the genuine, organic and sustainable change in society, which is reflective of the democratic ethos of the working of the Constitution.

**CHIEF JUSTICE CHANDRACHUD:** Thank You, Ms...

**MANISHA LAVKUMAR:** I conclude by saying that, My Lord, it's not a simple class of mere declaration of a result. It has very, very serious ramifications in considering the entire marriage regime and the ancillary social laws which are involved.

**CHIEF JUSTICE CHANDRACHUD:** Thank you, thank you.

**MANISHA LAVKUMAR:** Grateful.

**CHIEF JUSTICE CHANDRACHUD:** Thank you. No, we'll first hear Mr. Sai Deepak. He's got an order which has been given to us. Yes, Mr. Sai Deepak. Can you just formulate what will be your line of argument?

**J. SAI DEEPAK:** With My Lord's permission, given that I have only 20 minutes, in which I expect may not even happen, I'll do my best to simply formulate my position. And as opposed to reading out from anything, kindly allow me to just engage in the bench, because my written submissions capture my position that's already been shared. So, there are two aspects.

**CHIEF JUSTICE CHANDRACHUD:** Just give us 1 second, we'll just go to your written submission. So, as you are arguing, we can also keep a track of your submission.

1 **J SAI DEEPAK:** If I may My Lords, an additional written submission....

2

3 **CHIEF JUSTICE CHANDRACHUD:** Additional submissions or the original one?

4

5 **J SAI DEEPAK:** The original. The additional is a one page note and I'll anyway address  
6 it. So My Lords could perhaps refer to the first written submission.

7

8 **CHIEF JUSTICE CHANDRACHUD:** So what is broadly the line of...

9

10 **J SAI DEEPAK:** If I may say so, the first law of thermodynamics effectively encapsulates the  
11 entire position when it comes to physics, and from there all corollaries flow. So the central  
12 position that is effectively placed before My Lords, is with respect to the distinction between  
13 fetters and powers. Which is to say My Lords this particular area which the petitioners seek to  
14 espouse before My Lords, is an area which falls within either prohibited areas, or is it  
15 something that falls within the area for My Lords, adjudication. That is the central issue. And  
16 I think that is the forest that is sought to be presented before My Lords. I am here to perhaps  
17 unpack a few leaves for My Lord's consideration. The question of legislative competence is just  
18 one aspect of the issue, which hinges on separation of powers. But I go a step further, which is  
19 to say that when the petitions raise the question of change in heteronormative attitudes, does  
20 the society have a right of agency to participate in these proceedings or not, at least in this  
21 particular issue or not? Because this is not a question of separation of territories between  
22 different organs of the state, but it fundamentally hinges on the right or the agency of the  
23 society to participate in this particular discussion and that is the central problem in these kind  
24 of issues and subjects are taken up by the Court of law, as opposed to leaving it for legislative  
25 prerogative to apply it's mind. Point number two, during the course of these proceedings in  
26 the last two weeks, quite a few times I've heard the submission being made that is a Liberal  
27 democracy, It's a Liberal documents or Liberal documents so on and so forth. Does it mean  
28 that social conservatism has absolutely no place within the meaning of the Constitution? Does  
29 it mean that the society does not have the right to draw a few red lines, to basically say thus  
30 far, and no further? That is a central question. I represent a women's organization which  
31 equally represents the right of children and therefore as a civil society organization, the  
32 question that is being raised is that the nature of the prayers raised in the petition has the  
33 consequence of individualizing a sociocentric institution such as marriage, which is to say, as  
34 long as it is a transaction that takes place between two individuals who are consenting and  
35 who are not prohibited by any prohibition of degrees, so to speak, the rest of the society has  
36 absolutely no say as far as this institution is concerned. This, I'm sorry to say, fundamentally  
37 demeans the institution of marriage and takes away its social character. So, these are the meta

1 questions that I think which arise for consideration before this Honourable Court when these  
2 kind of petitions are filed. I am sorry to say this and let me try and perhaps tone down the rigor  
3 of my submission to the extent of saying I believe that they have a cause. I just don't believe  
4 they have a case. The cause is different from the case and it is important for the Court to  
5 seriously consider one aspect here, when there are issues of legislative competence, there's  
6 another figure, so to speak, which is involved. And that figures powers come under Article 111  
7 of the Constitution. Which is to say that "if a legislative proposal ultimately meets with the  
8 consent of both the Houses, ultimately, it has to go to the Honourable President, and the  
9 Honourable President also has the power to recommend amendments to a legislation".  
10 Therefore, this is not just a question of legislative prerogative or legislative sovereignty  
11 either for an external or an internal perspective. But there are multiple dramatic personnel  
12 stakeholders with this particular equation, the society being the chief, because ultimately, the  
13 petitions raise the question of changing the paradigm with respect to heteronormative  
14 attitudes of legislations in general. It is not just about the SMA. Plus My Lords is not dealing  
15 with a religion specific legislation. Here it is the SMA, which means all the more the society's  
16 participation when it comes to the SMA is warranted, is mandated, is compulsory. Because at  
17 least if it were to be with respect to certain, let's say, religion specific legislations that can be  
18 said that there is an identifiable group which has a locus to argue here. But when it comes to  
19 the SMA, it can't be the argument, that only those who subscribe to the values of SMA are  
20 allowed to participate in these proceedings.

21

22 Secondly, as has been already submitted, Section 21 of the SMA, has a direct bearing on  
23 personal laws. So even with respect to SMA, the society has a right to participate. The  
24 reason, why the additional written submissions become relevant is because, I filed  
25 an annexure, which is the Manual for Parliamentary Procedure of 2019, which was published  
26 by the Ministry of Parliamentary Affairs. And that particular manual, so to speak, has  
27 chapter 9, which deals with the business of legislation. Close to 30 clauses exist, detailing the  
28 manner in which a legislative proposal is to be considered in the first place. How the ball is  
29 set, rolling. And in that, if I may just refer to my additional written submission here I'll  
30 walk My Lords, through the relevant portion here. Additional written submission My Lords.....

31

32 **CHIEF JUSTICE CHANDRACHUD:** We have it here.

33

34 **J SAI DEEPAK:** Please My Lords. So para 1 effectively has captured my position with respect  
35 to Article 111. But the second paragraph is where I placed reliance on the Manual of  
36 Parliamentary Procedures. Does My Lord have it?

37

1 **CHIEF JUSTICE CHANDRACHUD:** Yes, we have.

2

3 **J SAI DEEPAK:** For the benefit of the bench may I just read this out?

4

5 **CHIEF JUSTICE CHANDRACHUD:** Which Para?

6

7 **J SAI DEEPAK:** Para 2. Page 2.

8

9 **CHIEF JUSTICE CHANDRACHUD:** Para 9.2?

10

11 **J SAI DEEPAK:** Exactly. Exactly. So para 2. So I'm reading out from the written submission,  
12 because that captures.

13

14 **CHIEF JUSTICE CHANDRACHUD:** Right. Right. Right.

15

16 **J SAI DEEPAK:** And the document itself is annexed. So let me just read out the  
17 submission My Lords. May I?

18

19 **CHIEF JUSTICE CHANDRACHUD:** Yes.

20

21 **J SAI DEEPAK:** Please. Does the rest of the bench have it?

22

23 **CHIEF JUSTICE CHANDRACHUD:** Yes. In addition to the above.

24

25 **J SAI DEEPAK:** 'In addition to the above' - so can I just read out para 1 for the sake of  
26 completion. I'm so sorry. May I?

27

28 **CHIEF JUSTICE CHANDRACHUD:** Please.

29

30 **J SAI DEEPAK:** 'It is humbly submitted that apart from circumvention of legislative  
31 prerogative and sovereignty violation of the doctrine of separation of powers seriously  
32 impinges and encroaches upon presidential prerogative under Article 111 of the  
33 Constitution. Under the said Article, firstly, the Honourable President has the right to receive  
34 the bill for his assent after it is passed by both houses of Parliament. This translates to  
35 countervailing obligations on the Parliament to present the bill for the Honourable President's  
36 assent. Further, under the article, not only does the Honourable President have the right to

1 withhold assent, but also the power to recommend amendments and also reconsideration of  
2 certain specific provisions in a certain bill.'

3

4 Now, paragraph number 2 - 'In addition to the above, reliance is also placed on the Manual of  
5 Parliamentary Procedures issued by the Ministry of Parliamentary Affairs in July 2019, which  
6 contains a specific chapter. Chapter 9, titled 'Legislation'. - My apologies for the speed. I'm  
7 just trying to keep up with time here. - 'The said chapter spells out in great detail the steps to  
8 be undertaken in promulgating a legislation. Critically, Clause 9.2 deals with a pre-drafting  
9 stage of a legislative proposal, which is divided into four broad stages that  
10 includes consultation between the concerned Ministry to which the legislative proposal relates  
11 and the Ministry of Law and justice. Critically, the latter Ministry shall review the legislative  
12 proposal for legal and constitutional feasibility validity as also. ' - And here, I quote 'necessity  
13 and desirability of such a proposal. Clause 9.5 envisages approval of the Cabinet, followed by  
14 an assentment, sorry assent, sorry assessment under Clause 9.6 of the expenditure involved.  
15 Critically Clause 9.7.1 envisages securing the recommendation of the Honourable President  
16 after the introduction of the bill, which is different from the assent sort under Article 111'

17 Then Clause 9.12 speaks of the possible referral of that particular bill to a select committee,  
18 or a joint committee, or for circulation for public opinion. If I may say so, and I say this with  
19 the deepest of respect and the greatest of humility that I can command at this point that the  
20 judicial mechanism cannot be a substitute to any of these steps, especially when it comes to  
21 such a serious issue. And I draw from Hindu Law here that the purpose of marriage or the  
22 object of Dampatya, is a child, is procreation. Now, therefore comes the central question with  
23 respect to all the permutations and combinations which My Lords posed by way of  
24 circumstances. What happens to a single child? What happens to a single parent? What  
25 happens if it's a homosexual, single parent? So on and so forth. Allow me to answer this  
26 question in a slightly different fashion. Public morality is decided by normative attitudes. The  
27 norm is decided primarily by the mainstream. This is not a majoritarian argument. This is a  
28 statement of fact in a Democracy. Point Number two, when normative attitudes are sought to  
29 be revisited to say that those who constitute the norm don't get to participate in this discussion  
30 because that particular process and that particular let's say dance of Democracy is sought to  
31 be circumvented by using the instrumentality of the court to secure a certain outcome. I'm  
32 sorry to say defeats the purpose of advocacy. Those who are interested in convincing the  
33 society are expected to engage with the rest of the society to make good their cause. The  
34 judiciary cannot be a substitute to this particular process because then that effectively replaces  
35 societal cogitation with, I'm sorry to use the words, judicial paternalism. That can't happen.

36

1 Three, the benefits of revisitation of a judgment with respect to such sensitive issues, even if it  
2 exists by way of clarifications. I'm sorry to say it's not an adequate substitute. It's a suboptimal  
3 substitute. Because if the principle that has been established by several judgments is that a  
4 judgment is not to be read in the manner of a statute, then there is no precision which can be  
5 imparted to the language or findings, and therefore the principles of statutory interpretation  
6 don't apply. So we are left with greater uncertainty.....

7

8 <NO AUDIO>

9

10 **J SAI DEEPAK:** May I?

11

12 **CHIEF JUSTICE CHANDRACHUD:** Please.

13

14 **J SAI DEEPAK:** The point that I'm perhaps trying to make, and which is what I'm trying to  
15 draw the Court's attention to, is that the NALSA judgment, that they placed reliance upon  
16 extensively, there is a plus, and there is perhaps a downside to it. The plus is, the judgment  
17 must be read in its context. And, the issue was the recognition of a third gender, that was what  
18 it was limited itself to. And therefore, to extrapolate the findings of that particular judgment,  
19 which primarily concerned itself with self-perception, self-identification in the context of  
20 gender identity, to extend it to a marital transaction or a marriage-like transaction, is to read  
21 a judgment for what it is not. Secondly, there are only three places...

22

23 **JUSTICE BHAT:** I think we perhaps are aware of how to read this judgment. Please, we don't  
24 need to be taught.

25

26 **J SAI DEEPAK:** No, I'm sorry. I understand. I'm just placing reliance on this and...

27

28 **JUSTICE BHAT:** Yes, we understand that these are in context. Whether they are analogies  
29 or not, is up to us.

30

31 **J SAI DEEPAK:** Please My Lords. I'm grateful. The second point is, in fact, on a closer  
32 reading of this particular judgment, certain inconsistencies emerge between the two opinions  
33 of the very same bench, in terms of, what constitutes sexual orientation, what constitutes  
34 gender identity? Now, that is natural, because there is a discussion that's going on there, it is  
35 not to be read in the same manner as a statute. In fact, therefore, the judgment, which doesn't  
36 exactly help their position, also points to a certain problem with respect to judicial revisitation  
37 of some of these aspects, and the judgment of Justice Arun Kumar of the Madras High Court,

1 is actually in the teeth of the submissions being made here, which is to say, narrow language  
2 being expanded through judicial interpretation, contrary to legislative intent in history, is to  
3 rewrite legislative history and judicial re-inscription, which is retrospective in nature, may not  
4 be exactly permissible. That's one. Then the submission with respect to international law, all  
5 the general instruments apart, the Yogyakarta Principle, specifically Clause 24.E, specifically  
6 leaves it to countries to decide if they wish to have recognition with respect to marital unions.  
7 So, it's not as if there is some kind of a binding precedent here, or there's no international  
8 instrument that says that you shall. I am not arguing for 'it should not be'. This caveat is  
9 important. I'm simply saying, if the door of judicial intervention in this matter is open for one  
10 case, even though the cause may be worthy, what does it do for the future, because ultimately,  
11 it's not just a question of one matter, it's a question of the future as well. So therefore, there  
12 are specific aspects that relate to the issue in question, and there are general aspects that relate  
13 to the separation of powers and societal participation, that go well beyond this matter. In light  
14 of this, My Lords, my only humble submission is, that there are other issues to be dealt with,  
15 and allow me to just point this out and use this particular forum to advocate only one aspect.  
16 Having actually engaged with certain transgender activists and also having worked with them,  
17 I know for a fact that one of their biggest problems is trafficking - them being pushed into  
18 prostitution, them not having legitimate livelihoods. I am not reducing or dismissing  
19 anybody's concerns with respect to what is their priority, let me clarify that. I'm not making  
20 that submission at all. But, these are certain Maslow's needs which have to be completed first,  
21 and which have to be addressed first, before we get to the next step. That's all I have to submit.  
22 So grateful for the kind...

23

24 **CHIEF JUSTICE CHANDRACHUD:** Thank you. Now, Mr. M. R. Shamshad.

25

26 **M R SHAMSHAD:** I've submitted four pages' notes, My Lord.

27

28 **CHIEF JUSTICE CHANDRACHUD:** We'll have a look at the note. Can you just identify  
29 the most critical point that you want to make?

30

31 **M R SHAMSHAD:** Two points I'm trying to convey My Lord, because Mr. Sibal, Mr...

32

33 **CHIEF JUSTICE CHANDRACHUD:** Just come straight to the point.

34

35 **M R SHAMSHAD:** They have already argued. My Lord, as far as the matrimonial legislations  
36 are concerned, those statutory legislations, 50 onwards, even in those legislations, there are  
37 scope of customs, practices, which have been practiced for a long time. Undefined practices



1 are part of those legislations. I have cited, for example, only four - two from Hindu-related...  
2 Hindu Religion Law, and two from Muslim. For example, Section 3(A) and 29 from the Hindu  
3 Marriage Act.

4

5 **CHIEF JUSTICE CHANDRACHUD:** Yes.

6

7 **M R SHAMSHAD:** Section 3(A) of Hindu Adoption and Maintenance Act, 1956. They take  
8 custom within the statutory regime. Those are not defined.

9

10 **CHIEF JUSTICE CHANDRACHUD:** So how do you formulate it?

11

12 **M R SHAMSHAD:** Even in the statutory regime, undefined customs and practices...

13

14 **CHIEF JUSTICE CHANDRACHUD:** Yes...

15

16 **M R SHAMSHAD:** ...of community and those who follow religious beliefs, have been made  
17 part of the statute.

18

19 **JUSTICE BHAT:** See 4(C) proviso of the Special Marriage Act, itself talks of subject to  
20 custom, and then it says how custom is to be proved.

21

22 **M R SHAMSHAD:** My Lord. So that is there. And we don't know ultimately, what custom is  
23 finally proved in certain facts and circumstances; that will depend upon case-to-case basis.  
24 Same way, in Muslim-related legislations My Lord, in Section 3, of Muslim Women's  
25 Protection of Divorce, 1996 Act, there are practices of Muslims, which have been recognized.  
26 1939 Act of Dissolution of Muslim Women, that sets out ground for divorce, but there is a  
27 provision which says that other grounds which is acknowledged in Muslim Personal Law. So,  
28 those have to come from uncodified sources of personal law.

29

30 **CHIEF JUSTICE CHANDRACHUD:** What is the next point?

31

32 **M R SHAMSHAD:** Next point, even if we talk of Special Marriage Act, My Lord, Section...  
33 reading of Section 19 to 21(A), takes us to custom within 3B, D, 7(3) of Hindu Succession Act.  
34 Section 19 to 21, if we read it together, detailed discussion has taken place on this My Lord. It  
35 takes us to Hindu Succession Act 3B, D, 7(3) and they are uncodified customs.

36

37 **CHIEF JUSTICE CHANDRACHUD:** All right, what is the next?

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**M R SHAMSHAD:** If we if we go to 27(1)(a), My Lord, then that takes us to Hindu Adoption and Maintenance Act, 3 (A), read with Section 10, Clause 3. So, this is one, My Lord. Second, as far as declaration is concerned, the declaration that has been sought for from that side, I completely adopt the arguments of Mr. Dwivedi, the learned Solicitor General, Mr. Kapil Sibal.

If Your Lordship declares this right, I just want to flag one or two problems. Within the realm of personal laws, those that the relationship may not be recognized, and it is not recognized in many personal laws. At the same time we have certain statutory bodies which only regulate religious affairs, like Hajj committees, like certain shrine boards. They only relate regulate religious affairs. Like if somebody goes tomorrow to Hajj Committee and says I have constitutionally declared right to remain as Union and I want to go on Hajj as couple, married couple.

**CHIEF JUSTICE CHANDRACHUD:** You have to wrap up now.

**M R SHAMSHAD:** I have two, three examples that I have. These are the problems which will be faced by even a statutory bodies. That you...

**CHIEF JUSTICE CHANDRACHUD:** Alright. Thank you, Mr. Shamshad .

**M R SHAMSHAD:** I am deeply obliged.

**CHIEF JUSTICE CHANDRACHUD:** Can I call upon Ms. Priya Aristotle please? Thank you, Mr. Shamshad. Thank you.

**M R SHAMSHAD:** I am deeply obliged.

**CHIEF JUSTICE CHANDRACHUD:** Sorry to cut you short, but we are now... We'll read your note. Yes, Ms. Aristotle.

**PRIYA ARISTOTLE:** Much obliged My Lord. I stand here representing a student, Jerusha Joel, and I have three lines of argument only, My Lord. One is about the history and the marriage aspect, which is social. And about the canvas, which My Lord opened up normally, on a canvas we want to see who's...

**CHIEF JUSTICE CHANDRACHUD:** You've given us written submissions?

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**PRIYA ARISTOTLE:** Yes, so I will not get deep into it. But how much is necessary. And third is the ASG addressed about the adoptions and the kids. But what about our children who are going to school? They have been receiving a lot of propagation, which has been going on, and we just need a little protection for them at this tender age when this is being done on a day to day basis in the name of gender clubs. So the first is as we all know the word normally used here, even in IPC was sodomy. The origin of this is the sin of Sodom, which comes from the Bible. And...

**CHIEF JUSTICE CHANDRACHUD:** What's the core of the submission. Tell us the core of the submission.

**PRIYA ARISTOTLE:** I just want to bring up the historic aspect.

**CHIEF JUSTICE CHANDRACHUD:** No, don't give us history. Give us the core of the submission.

**PRIYA ARISTOTLE:** That is all. So I just want to say that we are not following the Victorian Law, but it originated 5000 years back. And it's basically the Jewish law that we follow and that is how all this was abolished, like adultery, monogamy, sodomy, sati everything was there, but all that came with the reformation, which was gone on with it. Now they've come for legalizing it. As long as people do not come to legislate certain things. There are many things that are happening. Like I have visited ashrams, like because my family comes from a set of priests where....

**CHIEF JUSTICE CHANDRACHUD:** We got your point.

**PRIYA ARISTOTLE:** In fact they must be incest.

**CHIEF JUSTICE CHANDRACHUD:** It has to be in the form of legislation.

**PRIYA ARISTOTLE:** Exactly. But if these people this group is going to come and ask My Lords for legislating, it definitely it's a no. But if it is going to happen behind the doors, nobody is going to be bothered.

**CHIEF JUSTICE CHANDRACHUD:** Nobody's made that point. Now I think we can....

1 **PRIYA ARISTOTLE:** Yes.

2

3 **CHIEF JUSTICE CHANDRACHUD:** Anything else which has not been covered?

4

5 **PRIYA ARISTOTLE:** Absolutely, My Lord. Now, going behind the canvas. Who is behind  
6 the canvas? Internationally. It's not just in this court. I was listening to the UN arguing, the  
7 US Court arguments, the audio of it. Literally it's a replica of what's happening there, and in  
8 many other nations. There are no new submissions that are made.

9

10 **CHIEF JUSTICE CHANDRACHUD:** So thank you, Ms. Aristotle. I think we can close here  
11 yes. Thank you Ms. Aristotle. What about Mr. ...

12

13 **PRIYA ARISTOTLE:** One thing about the UN agenda, My Lord. Recently, not very long  
14 back, recently I have submitted my thing so I know it is not going to get into it. But very  
15 recently they have come with principles more than 20 principles and principle number 16 is  
16 about consensual sexual conduct. With the new principles coming in My Lords doesn't have  
17 to worry about the age factor, whether it's going to be 18 or 21 because UN has come up with  
18 a guideline saying that you don't have to even if they are minors, if they're going to consent for  
19 sexual things, it cannot be criminalized. And again, it goes on for 18, it says sexual orientation.  
20 Anybody can guide a minor to get into. It comes there My Lord, I have marked it at page 119  
21 to 144 are my UN agenda thing. So again, our children, who are going to school, every other  
22 day there is a propagation of this that is going on and they need to be protected. In  
23 Russia there's a thing against propagation of...

24

25 **CHIEF JUSTICE CHANDRACHUD:** Thank you, Ms. Aristotle. Now we'll hear Ms.  
26 Manisha Narayan Agarwal.

27

28 **PRIYA ARISTOTLE:** Much obliged.

29

30 **CHIEF JUSTICE CHANDRACHUD:** What's the punch point?

31

32 **MANISHA NARAYAN:** My punch point is in the first para of my written submissions. The  
33 question that I ask myself is, can there be a declaration of... Can there be a declaration that an  
34 absence of recognition is void, and what will be the consequence of such a declaration My  
35 Lord? Will the consequence of such a declaration be creation of the recognition? And there is  
36 only one parallel which I will draw is there was a time when our statutes recognized joint and  
37 several liability partnerships, but did not recognize limited liability partnerships. Could

1 someone take up the Partnership Act as law under Article 13(2), and pray to  
2 this Honourable Court to recognize, to declare as void the absence of limited liability  
3 partnerships?  
4

5 **CHIEF JUSTICE CHANDRACHUD:** All right. Thank you Miss. Thank you. You got the  
6 point. Thank you.  
7

8 **MS MANISHA NARAYAN:** I'm obliged.  
9

10 **CHIEF JUSTICE CHANDRACHUD:** Thank you, Mr. Joby Varghese.  
11

12 **SASMIT PATRA:** I am Sasmit Patra. I'm representing two organizations. I'm also at a  
13 personal capacity as a Member of Parliament of Rajya Sabha.  
14

15 **CHIEF JUSTICE CHANDRACHUD:** Yes Mr. Patra.  
16

17 **SASMIT PATRA:** Your Lordships I have two basic points. Two minutes. And I'm done. First,  
18 capacity of Parliament. That has not been taken up. We've talked about separation of powers,  
19 various things, capacity of Parliament. I'll elaborate on that. Second, role of policy.  
20

21 **CHIEF JUSTICE CHANDRACHUD:** Just one second.  
22

23 **SASMIT PATRA:** I'm sorry Your Lordship. I'm having to rush because of the time.  
24

25 **CHIEF JUSTICE CHANDRACHUD:** What was the argument?  
26

27 **SASMIT PATRA:** The argument is capacity of Parliament. I've filed a three page submission  
28 report in which the fourth para, if you see there is a....  
29

30 **CHIEF JUSTICE CHANDRACHUD:** Give us one minute. What we'll do is, we'll come  
31 back after lunch. We'll give you five minutes after lunch.  
32

33 **SASMIT PATRA:** Thank you Your Lordship. Deeply obliged.  
34

35 **TUSHAR MEHTA:** I need only 5 to 7 minutes,  
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37 **CHIEF JUSTICE CHANDRACHUD:** Certainly.

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**TUSHAR MEHTA:** I'll not repeat anything...

**ADVOCATE#3:** <UNCLEAR>

**CHIEF JUSTICE CHANDRACHUD:** Of course of course...

**K V VISWANATHAN:** Your Lordships leave to upload the note in rejoinder, which will be the basis for the submission today.

**CHIEF JUSTICE CHANDRACHUD:** All right. Certainly.

**ADVOCATE #4:** My Lords in 501 <UNCLEAR> Counsel is appearing online My Lords.

-----**SESSION 2**-----

**ADVOCATE #3:** I just wanted Your Lordship's permission to put in an additional note. On the last occasion I referred to two judgments of the New Zealand Supreme Court and also give a reference. I will make that complete. Of course with the help of the <UNCLEAR>

**CHIEF JUSTICE CHANDRACHUD:** So, Mr. Sasmit Patra.

**SASMIT PATRA:** Thank you. Your Lordships. firstly, many thanks to you there for giving me this five minutes post lunch and posting it after. Deeply grateful Your Lordships. Your Lordships three points at which we stopped before lunch. First one, Capacity and functionality of the Parliament. Second, role of the Polity.

**CHIEF JUSTICE CHANDRACHUD:** What is the first point?

**SASMIT PATRA:** Capacity and functionality of the Parliament. Your Lordship, because, I also am a practitioner from the Parliament, being a member and also happen to be a Vice Chairman of the Rajya Sabha. So, therefore I am trying to bring in very briefly, in the five minutes that I have, an evidence as to what goes behind capacity and functionality of the Parliament and why the Parliament should hear this, I mean go after this. Second, role of the Polity. Now, role of Polity is very crucial and I will talk about that in a bit. And the third, impact on public policy due to legislative absence. Impact on public

1 policy due to legislative absence. Lordship, I will very briefly take you through a three page  
2 note that was filed by me. And that three page note the first page and I am not going into any  
3 of the transcripts of that to save time. I will come straight to para 3, and para 4 on  
4 page 2, which has a table. Probably, I will also skip para 3. I will just come to para 4 right  
5 away. There is a table.

6

7 **CHIEF JUSTICE CHANDRACHUD:** I don't think we have it. No your note has to...

8

9 **JUSTICE KOHLI:** We don't have it

10

11 **SASMIT PATRA:** Joby Varghese.

12

13 **CHIEF JUSTICE CHANDRACHUD:** Yes, yes . Joby Varghese.

14

15 **JUSTICE BHAT:** Nine page note.

16

17 **SASMIT PATRA:** I have got hard copies as well.

18

19 **CHIEF JUSTICE CHANDRACHUD:** No, we have got it, we have got it, yes.

20

21 **JUSTICE BHAT:** Shakti Foundation?

22

23 **SASMIT PATRA:** Shakti foundation, yes Your Lordship.

24

25 **JUSTICE BHAT:** Where you have mentioned this new bill, which is that Jan Vishwas?

26

27 **SASMIT PATRA:** Jan Vishwas Amendment of Provisions Bill 2022. Your Lordship, why  
28 have I mentioned it? It is already a public document which was presented to the Lok Sabah on  
29 2023 and the Rajya Sabha. Today we are talking about SMA as a canvas, but we all agree to an  
30 extent that without the personal laws being in the ambit , this entire matter cannot be taken  
31 up. I wanted to give an evidence in this effect through this Jan Vishwas bill, how the Parliament  
32 has the capacity and the functionality to deal in a matter which is having wider ramifications.  
33 This bill, Your lordships, imagine this, 42 laws of this country are going to be in some way  
34 affected. 42 Laws, 182 amendments, across 19 Ministries of this country. So for something as  
35 mammoth as this, it is the Parliamentary Committee and this case it was the joint committee  
36 that was done, which actually has the capability, capacity and functionality in order to go after  
37 and deal with a matter which deals with 182 amendments only in one bill, dealing with 19

1 ministries of this country, dealing with 42 laws of this country. That is my first part of the point  
2 that I'm trying to make, that if we are going forward in this matter, which will have wider  
3 ramifications, will have impact on other laws, then this could be a parameter to look at.  
4 Second, if you go to Para 5, I've spoken about the JPCs, the Select Committees. I'll not focus  
5 on that. The next one is, paras 6, Surrogacy Bill, sensitive, sent to a select committee, dealt  
6 with appropriately, the capacity and the functionality of the Parliament. Page 3, the Mediation  
7 Bill 2021, which is going to be tabled in the Parliament very soon. 23 meetings have gone  
8 through Your Lordship, to the Department related Standing Committee  
9 on personnel, public grievances, law and justice. To do what? To ensure that we have a fool  
10 proof law. To have this kind of a debate and discussion, the appropriate forum is the  
11 Parliament. I was a member of this committee when this mediation bill was being discussed.  
12 And the reason why I have tried to build on the first point and I'll stop my first point here, is  
13 the capacity and the capability and the functionality of the Parliament. I'll go to the second  
14 point. I'll not take more than five minutes as committed to it. I won't.

15

16 Second, Role of Polity. Your Lordship, we may talk about it as a social construct. We may talk  
17 about it as a legal construct. We may talk about it as a socio-legal construct. But unless you are  
18 able to flesh this out, through the role of the Polity, which has been absent so far, then it will  
19 not be very fruitful to be able to broad-base it and take it right down to the bottom of the  
20 pyramid. In doing so, the role of the Polity at this matter, we may have a declaration but the  
21 role of the Polity in this matter has been completely silent. Where can we find that? We can  
22 find it through the Parliament. Your Lordships, therefore my point number 10. Voice of 1.4  
23 billion people. You have 788 members of Parliament, 245 Rajya Sabha, 543 Lok Sabha. 12 of  
24 them appointed by the Honourable President of India. Wouldn't be befitting to actually send  
25 something as widely impacting as this to the Parliament to be dealt with appropriately and  
26 more holistically, where the canvas could deal with this, will be much wider than the canvas  
27 that we're looking at.

28

29 Third and my final point and I close, is the impact on public policy due to legislative absence.  
30 Your Lordships, let's assume for a moment we have a declaration. How do we execute that  
31 declaration? In Navtej you have a declaration, fundamental right taken up, in Visakha, it went  
32 into a law, sexual harassment law. In terms of Sharaya Bano, a law, a legislation. So whenever  
33 you find that there is a declaration, it goes into a law and thereby has public policy precepts  
34 that are added to it. In this case because the Parliament does not have or hasn't dealt with it,  
35 we may have a declaration but the Parliament may not go and dispose it off as a law. In that  
36 case, the declaration would be there, writ of mandamus may be there, but the public policy  
37 precepts and the public policy implementation on the ground may be difficult. What would



1 inter alia happen? You might have contempt notices is coming. Therefore, Your Lordship. I'll  
2 close here. My five minutes are over, that these three basic parameters, capacity and  
3 functionality of the Parliament, Role of the Polity and Impact on public policy due to  
4 legislative absence in this matter are extremely crucial. My humble and limited prayer, send it  
5 to the Parliament. I'm not going to the merits of the matter at all. Whether it is right, whether  
6 it's wrong? I'm going into it. I'm going on the very simple principle. Send it to Parliament. Let  
7 the Parliament deal with it. Thank you.

8

9 **CHIEF JUSTICE CHANDRACHUD:** Thank you, Mr. Patra,

10

11 **SASMIT PATRA:** Deeply obliged.

12

13 **CHIEF JUSTICE CHANDRACHUD:** This was Mr. Patra, the Counsel, of course,  
14 arguing. Not Mr. Patra, as the Parliamentarian. Thank you, Mr. Patra.

15

16 **SASMIT PATRA:** Deeply grateful to Your Lordships. Thank you. Thank you.

17

18 **DR. SINGHVI:** I've been goading him to come more to court. He is slowly starting My Lords.

19

20 **SASMIT PATRA:** Thank you sir.

21

22 **CHIEF JUSTICE CHANDRACHUD:** We will also respectfully join in that chorus. Yes, we  
23 now hear Mr. Atulesh Kumar.

24

25 **ATULESH KUMAR:** My Lord on my behalf Mr. Nadkarni has already submitted but I wish  
26 to make one point My Lord although I am adopting this submission of learned solicitors  
27 Mr. Dwivedi and Mr. Datar. That in para 7 of my note I have said even that Your Lordships  
28 told that you are not considering the personal law and considering only a Special Marriage  
29 Act but Special Marriage Act is not in isolation. It affects the other personal rights and family a  
30 lot. So for Hindu, Hindu is considered, so in any divergence or deletion and addition in the  
31 Special Marriage Act so far to include their submission, It will certainly affect us. Larger  
32 ambulation.

33

34 **CHIEF JUSTICE CHANDRACHUD:** This has been argued by others also.

35

36 **ATULESH KUMAR:** Yes My Lord.

37

1 **CHIEF JUSTICE CHANDRACHUD:** Anything else that you would like to say which will  
2 not been...

3

4 **ATULESH KUMAR:** I'm adopting the same. Obligated My Lord. Deeply obliged.

5

6 **CHIEF JUSTICE CHANDRACHUD:** Ms. Filza Moonis. Yes, Ms. Moonis.

7

8 **FILZA MOONIS:** On my behalf, My Lords my learned friend will argue.

9

10 **CHIEF JUSTICE CHANDRACHUD:** Yes. What do you mean on your behalf? Are you in  
11 person or...

12

13 **FILZA MOONIS:** She's the AOR.

14

15 **CHIEF JUSTICE CHANDRACHUD:** Oh you are the AOR.

16

17 **SANJIVANI AGGARWAL:** I am advocate Sanjivani Aggarwal My  
18 Lords. Representing Light Life Freedom.

19

20 **CHIEF JUSTICE CHANDRACHUD:** Sorry, what's your name?

21

22 **SANJIVANI AGGARWAL:** Sanjivani Aggarwal. Obligated My Lord.

23

24 **CHIEF JUSTICE CHANDRACHUD:** Yes Sanjivani.

25

26 **SANJIVANI AGGARWAL:** My Lord, I will be referring from the written submissions,  
27 which were submitted yesterday. So it's like very brief.

28

29 **JUSTICE KOHLI:** Are they there? In whose name are they?

30

31 **SANJIVANI AGGARWAL:** Miss Filza Moonis's name ma'am My Lord. Did you find it?

32

33 **JUSTICE KOHLI:** Five pages.

34

35 **SANJIVANI AGGARWAL:** Yeah, ma'am. My Lord, I'll start from point number two, and  
36 I'll be very brief. I understand most of the points have already been discussed. So under Article  
37 21, right to marry is a universal right, My Lord, but it is not a fundamental right. And I'll

1 take you straight to point number six. India is a developing nation having still fighting for the  
2 girl child basic rights My Lord.

3

4 **CHIEF JUSTICE CHANDRACHUD:** You said right to marry is a... ?

5

6 **SANJIVANI AGGARWAL:** My Lord, it is not a fundamental right, though it is a universal  
7 right. It is humbly submitted that as per the Economic Survey of Ministry of Finance 65% as  
8 per 2021 data, India's population lives in rural areas and they are ignorant people. They don't  
9 know about what same sex marriage is and it's repercussions. It is humbly  
10 submitted therefore, My Lord, that there are still questions and challenges which we have to  
11 resolve to lay the foundation of modern societies, especially in schools, where children are not  
12 aware of what same sex marriage is and what sexual orientation is. During a parent's teachers  
13 meeting, My Lord, how would a child react to a classmate having same sex parents? We are  
14 still paving away as a country to provide toilets to all the citizens and therefore we have...

15

16 **CHIEF JUSTICE CHANDRACHUD:** So, social acceptability you are saying?

17

18 **SANJIVANI AGGARWAL:** Absolutely My Lord. It's a very important point.

19

20 **CHIEF JUSTICE CHANDRACHUD:** All right, fair enough. What's the next point?

21

22 **SANJIVANI AGGARWAL:** That's why it's important that we first create awareness on the  
23 subject before having a law which legalize same sex marriage. It is important that...

24

25 **CHIEF JUSTICE CHANDRACHUD:** Alright. That Sanjivani may have already been  
26 covered.

27

28 **SANJIVANI AGGARWAL:** Absolutely, I understand.

29

30 **CHIEF JUSTICE CHANDRACHUD:** Thank you.

31

32 **SANJIVANI AGGARWAL:** Highly obliged.

33

34 **CHIEF JUSTICE CHANDRACHUD:** Mr. Gaurav Aggarwal. Thank you, Sanjivani. Thank  
35 you Filza. Mr. Agarwal doesn't seem to be...Alright, then Mr. Som Thomas.

36

1 **SOM THOMAS:** Yes, My Lord, I am party in person. I have come from Bangalore just for  
2 this two minutes.

3

4 **CHIEF JUSTICE CHANDRACHUD:** Yes.

5

6 **SOM THOMAS:** My Lords, I have made a detailed submission. There are about seven points.  
7 I will pick up only three, quickly. First of all, marriage is a biological institution, before it is a  
8 social institution and Indian Law is substantive in it's coverage of marriage. Many  
9 Jurisdictions that have legalized same sex marriage are primarily procedural, who can get  
10 married, how they can get married in the presence of whom. But Indian law is substantive and  
11 the specific point there is, sexual intercourse and sexual intercourse of a specific kind. And  
12 that is why, there are words like consummation, there is the word, impotency. There is a sense  
13 of fulfilling a responsibility, a sexual responsibility in marriage and if that responsibility  
14 cannot be fulfilled or will not be fulfilled, the marriage fails. And the first cause for dissolution  
15 of a marriage, that is listed in the laws is, taking the sexual intercourse outside of marriage.  
16 What Your Lordships talked about, 'exclusionary'. But when the exclusion is violated, that  
17 becomes the first cause for breaking the marriage. So this specific type of sexual intercourse is  
18 the basis for making and breaking of marriage. This has to be recognized. And this is important  
19 as we go along. I have talked about in my submission about the burden on the state  
20 infrastructure for protecting families, basically, family courts. For example, if two women  
21 friends live together in a flat, when does their relationship, their friendship become a  
22 marriage? What is the responsibility to each other in such a marriage? Two men living together  
23 when they have disputes, can it be taken to a family court? What is the family court supposed  
24 to do with it? And if a bisexual is involved, does he or she have a right to go outside the  
25 marriage, for multiple partners? Once family courts have to start dealing with all of this, they  
26 will necessarily have to start delinking, this first element of marriage, sexual intercourse. They  
27 will have to kind of say, look, sexual intercourse is in the private domain, and we don't want to  
28 get into it. Are there other ways we can look at it? So, in that sense, the entire marriage  
29 narrative that has existed, not just from 1950, but I would say 1950 BC and before  
30 that, predicated on sexual intercourse of a specific kind, will become less of sexual  
31 responsibility and more of sexual autonomy. This may work well for the petitioners, but this  
32 is not what marriage is. And my closing point on that is, that there is then no cause for  
33 the Government, for the State to give privilege to relationships per se, that claim to be in varied  
34 colours, including bisexual, multi-partner relationships. But we can give credence to the  
35 concept of a household, even in Deepika Singh versus CAT, it was really the household and the  
36 protection of the children, that was the concern and not relationships per se, and so even to  
37 the Government, I have already written on the policy front that, yes, you can have a concept of

1 household. It doesn't have to depend on marriage or anything like that. There is a nexus  
2 between marriage and gender, which the other party denies. But there is no nexus between  
3 marriage and insurance, between marriage and gratuity, necessarily. The guidelines can  
4 separate the two. In my corporate career in the period between Naaz and Kaushal, my  
5 company itself allowed employees to declare a partner for insurance and it was done. So, these  
6 are doable things without getting into the area of marriage, that to the substantive aspect of  
7 marriage. The other party is primarily keen on the procedural aspect of marriage. Give us  
8 marriage, give us the recognition. Just give us the procedure to get through and get the label  
9 marriage. But what's the content of marriage, we are concerned about as married  
10 people? I have 33 years of marriage behind me, I am concerned that marriage should and sex  
11 should remain in the arena of responsibility, not autonomy. Because marriage is not  
12 autonomy. Marriage is where you give up autonomy and you work for a common good and you  
13 work for the children. That's what I wanted to say. Thank you, My Lord.

14

15 **CHIEF JUSTICE CHANDRACHUD:** Thank you, Mr. Thomas. Thank you for coming all  
16 the way from Bangalore to assist us. Deeply appreciate it. Thank you. I think we are now  
17 concluding, Mr. Solicitor, would you like to? At some point now we'll have to close, apply  
18 closure. We've heard a diversity of viewpoints. All right 30 seconds, just the last.

19

20 **PRASHANT DIXIT:** My Lords, recognition or declaration of bisexual or pansexual person's  
21 marriage will directly lead to bigamy and polygamy in this country, My Lords.

22

23 **CHIEF JUSTICE CHANDRACHUD:** Alright.

24

25 **PRASHANT DIXIT:** I'll explain My Lords.

26

27 **CHIEF JUSTICE CHANDRACHUD:** No. You made your point. Don't explain. We got your  
28 point. That's all right. We understood the point. You don't have to...

29

30 **PRASHANT DIXIT:** If only rights of bigamy or polygamy to bisexuals or pan-sexuals, we'll  
31 also have to grant it to heterosexuals and other LGBTQ people as well.

32

33 **CHIEF JUSTICE CHANDRACHUD:** All right. Thank you. What is your name?

34

35 **PRASHANT DIXIT:** Prashant Dixit My Lords.

36

37 **CHIEF JUSTICE CHANDRACHUD:** Yes. So what's your name? Who is up next?

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**SPEAKER:** My Lords, IN 501..., training Counsel will appear online, he wishes to make submission for 30 seconds, My Lords.

**CHIEF JUSTICE CHANDRACHUD:** Who is appearing? Mr. Jha? Yes, Mr. Jha?

**MR. JHA:** Yes sir. I will just make 30 seconds point. Point number one...

**CHIEF JUSTICE CHANDRACHUD:** The fastest finger first, yes.

**MR. JHA:** The petitioners claim that marriage is a private affair and that is why they quoted Navtej, Puttaswamy etc. But the matter of fact is that marriage is not private, it is a social affair, sexual interaction...

**CHIEF JUSTICE CHANDRACHUD:** Alright, I got the point. Thank you, Mr. Jha.

**MR. JHA:** Point number two. I'll just take 30 seconds. Not more than 30. Point number two. Now, same sex marriage is expected in heterosexual society or system currently before the court. But I guess the law, heterosexual law, which is currently in hold, is not competent enough to give homosexuals those specific rights. And that is why you need to have new laws and not the changes in this law.

**CHIEF JUSTICE CHANDRACHUD:** Alright, thank you. Now who is?

**GP CAPT BHATI:** My IN number is 91562. My name is Group Captain Karan Singh Bhatti. And for Ex Servicemen Lawyers Association, I am representing. Only one issue, that Your Lordship is aware why it is necessary. In Joseph Shine, the first part original judgment did not deal with peculiar circumstances of armed forces, but the second, then the Constitution Bench had to say, Lordship may bear that my application and submissions are only on that. It's an entirely different class and it will create a havoc if such a thing is to come. I'm deeply obliged.

**CHIEF JUSTICE CHANDRACHUD:** Thank you.

**ANSON THOMAS:** I am Anson Thomas.

**CHIEF JUSTICE CHANDRACHUD:** One second Mr. Thomas.

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**SPEAKER #2:** I make only one point. The essence of family and composition of families are unalterable. My lord, in a joint family, if a grandson marries, the same sex marriage had happened, then the family composition is destroyed.

**CHIEF JUSTICE CHANDRACHUD:** Alright, who is next?

**SPEAKER #2:** I filed the annexures also My Lord. Thank you.

**CHIEF JUSTICE CHANDRACHUD:** Yes sure, thank you.

**ANSON THOMAS:** My Lords...

**CHIEF JUSTICE CHANDRACHUD:** One second Mr. Thomas. Please introduce yourself.

**GAURAV KUMAR AGARWAL:** My IA number is 9394.

**CHIEF JUSTICE CHANDRACHUD:** What's the point you're making? And please introduce yourself.

**GAURAV KUMAR AGRAWAL:** My name is Gaurav Kumar Aggarwal. First point is that it is the issue regarding the nomenclature, that they want, petitioner want the use of the term marriage, whereas we are denying this.

**CHIEF JUSTICE CHANDRACHUD:** Alright, thank you.

**GAURAV KUMAR AGGARWAL:** Second point, one more point. The purpose of marriage is to have legitimate children.

**CHIEF JUSTICE CHANDRACHUD:** All right. Thank you. We've heard that before. Yes. Thank you

**DR. A P SINGH:** My IA number is 67242, Dr. A P Singh. Yes. On behalf of Anita Chauhan, she is the applicant, My Lord.

**CHIEF JUSTICE CHANDRACHUD:** What's your point?

1 **DR. A P SINGH:** My point is same sex marriage is totally unnatural and against the health  
2 parameter as per World Health Organization.

3

4 **CHIEF JUSTICE CHANDRACHUD:** All right, thank you.

5

6 **DR. A P SINGH:** Second, My Lord, Union of India has shown a specific section which applies  
7 only to biological men and women. Legal recognition for same sex marriage is unlawful, illegal  
8 because the notion of marriage itself necessarily proposes Union between two persons of  
9 opposite sex.

10

11 **CHIEF JUSTICE CHANDRACHUD:** Alright who else now? Anybody else left?

12

13 **DHAVAN UNNIYAL:** My name is Dhavan Unniyal.

14

15 **CHIEF JUSTICE CHANDRACHUD:** Yes Mr. Unniyal.

16

17 **DHAVAN UNNIYAL:** Only one point as we rely upon the written submissions. The  
18 fundamental right of an adopted child, para number ten.

19

20 **CHIEF JUSTICE CHANDRACHUD:** Ms. Bhati, has argued that in the morning thank you.

21

22 **NAVIN PAHWA:** It's only 1 minute. I am Navin Pahwa. Justice and so on. It's only one  
23 submission that the Doctrine of up-reading down can be achieved only without making  
24 any bent or bent in the law without making extensive additions or deletions etc. which is not  
25 possible in the facts of the present case.

26

27 **CHIEF JUSTICE CHANDRACHUD:** Thank you, thank you. Anybody else? Solicitor?

28

29 **TUSHAR MEHTA:** My Lords I'll take just five minutes and not more My Lords.

30

31 **ANSON THOMAS:** I am Anson Thoms...

32

33 **CHIEF JUSTICE CHANDRACHUD:** Just 1 second Solicitor. Mr. Thomas, what do you  
34 want to say?

35

36 **ANSON THOMAS:** IA 3410. My letter to the Honourable Chief Justice on 13th March and  
37 also on 17th April.



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**CHIEF JUSTICE CHANDRACHUD:** Yes. What's the point you're making, Mr. Thomas?

**ANSON THOMAS:** Chief justice of India should recuse in this particular matter.

**CHIEF JUSTICE CHANDRACHUD:** Thank you, Mr. Thomas, application rejected.

**TUSHAR MEHTA:** I've objected, leave it at that My Lords.

**CHIEF JUSTICE CHANDRACHUD:** Yes.

**TUSHAR MEHTA:** Please ignore My Lord. There's some aberrations My Lords. I object My Lords since he has made the submission, I officially object to this submission being made. My Lords, five minutes. During yesterday's dialogue it felt that there is a possibility of a declaration being made, something less than marriage but something more than the present status. My Lords having examined that, Why that may not be a correct course of action? Your Lordships declaration would be a law within the meaning of Article 141. Binding all, not just all courts, binding the whole nation....

[NO AUDIO]

The difficulty would be this. My Lord any declaration of law would bind every individual in the country who is not before Your Lordships. In case of a law, every individual is represented by his chosen representative. That is the first issue. But Your Lordships are aware about the judgment in that Baker's case where one Baker refused to Bake a cake in a same sex marriage and he was prosecuted etc. Similar thing happened My Lord after the judgment of the American Supreme Court. Five verses Four. One Pastor refused to perform the ceremony of marriage and he was sought to be prosecuted and they have to come out with a law. What is called the Pastor Protection Act. Now examine My Lords a situation where Your Lordship declares the law. Your Lordships would obviously not be declaring the contours of the declaration. The regulatory powers, what will be the regulation? Who will be bound? Who will not be bound? Suppose someone goes to a Priest for performing a particular ritual and Priest says that as per my religion, it is only the husband and wife who can sit, a man and a woman who can sit in performance of that ritual. I will not be a party to it. I'm posing a question to myself would he not be guilty of contempt of Your Lordship's declaration? What would be the position My Lord in case of say visa? Where a wife gets the entitlement to Visa, but only ...

1 [ NO AUDIO]

2

3 **JUSTICE BHAT:** See that's a matter of, that breaches fundamental right to follow his  
4 conscience and faith.

5

6 **TUSHAR MEHTA:** Where that conscience stops, and where his duty ends or begins.

7

8 **JUSTICE BHAT:** That's where Solicitor, what is the kind, form, content and contours of the  
9 Declaration is important.

10

11 **TUSHAR MEHTA:** Correct.

12

13 **JUSTICE BHAT:** We are all presuming, that the Declaration will be in the form of  
14 a Writ, that grant this or grant that. This is what we are accustomed to. What I was hinting  
15 was, as a Constitutional Court, we recognize only a state of affair and draw the limit there and  
16 say.

17

18 **TUSHAR MEHTA:** And I am grateful, my worry was this. Whenever a Declaration is  
19 made, either by Legislature or by the Court, legislature has the wherewithal to regulate the  
20 fallout, Your Lordships, would not be able to, first of all, foresee, envisage, comprehend and  
21 thereafter deal with the fallout of that declaration. Fallout can be manifold, in various facets  
22 of life, in various, My Lord the..

23

24 **CHIEF JUSTICE CHANDRACHUD:** You are saying that any declaration of this  
25 Court, will really in that sense, apply to every one individual in the nation and pre-empt the  
26 Legislature from considering?

27

28 **TUSHAR MEHTA:** No, I am slightly on a different point. It may not even pre-  
29 empt the legislature. Legislature can still do something, but that would be My Lord, and for  
30 that, I would one paragraph, I am tempted to read from this Obergefell judgment.

31

32 **CHIEF JUSTICE CHANDRACHUD:** That's okay we will read.

33

34 **TUSHAR MEHTA:** Only one paragraph for my satisfaction.

35

36 **CHIEF JUSTICE CHANDRACHUD:** Tell us the para number that's all.

37

1 **TUSHAR MEHTA:** I would wish Your Lordships read it. I won't take more than two  
2 minutes. It is 2463, volume 4 of the Petitioner's compilation. For my satisfaction, please have  
3 a look and this angle My Lords is missed by all of us. And we also feel, that there would be  
4 some disservice as Chief Justice Roberts points out to the petitioners, and therefore I wish to  
5 read it. Kindly have a look at 2463.

6

7 **CHIEF JUSTICE CHANDRACHUD:** Just read it.

8

9 **TUSHAR MEHTA:** I will just read it. When decisions are reached through democratic  
10 means, some people will inevitably be disappointed with the result. But those whose views do  
11 not prevail, at least know that they had their say and accordingly, are in the tradition of our  
12 political culture, reconciled to the result of a fair and honest debate. In addition, they can gear  
13 up to raise the issue later, hoping to persuade enough on the winning side, to think again. That  
14 is exactly how our system of governance is supposed to be. But today, the Court puts a stop to  
15 all that. This is what in my submission, the declaration would mean. But today, the court puts  
16 a stop to all that. By deciding this question under the Constitution, the Court removes it.

17

18 **JUSTICE BHAT:** It is very important that you read that. What you put out there is, Chief  
19 Justice is highlighting, that the declaration that they have a right to marry. What was  
20 that? Justice Kennedy declared that gay couples have a right to marry.

21

22 **TUSHAR MEHTA:** Correct My Lords.

23

24 **JUSTICE BHAT:** Now, we are intensely aware of that. We are intensely aware of that.

25

26 **TUSHAR MEHTA:** I am grateful. Kindly something further, which is on a slightly different  
27 point. Therefore, I would like to read it fully. There will be consequences to shutting down the  
28 political process on an issue of such profound public significance. Closing debate tends to close  
29 minds. People denied a voice, are less likely to accept the ruling of a court, on an issue that  
30 does not seem to be the sort of thing courts usually decide. As a thoughtful commentator  
31 observed about another issue, the political process was moving not swiftly enough for  
32 advocates of quick, complete change, but majoritarian institutions where listening to and  
33 acting, kindly avoid the citation part. This is crucial. And this is another dimension, which  
34 Chief Justice Robert gives. Indeed however, please note this. Indeed however, heartened the  
35 proponents of same sex marriage might be on this day, it is worth acknowledging what they  
36 have lost. From their point of view, the Court says. Indeed, however, heartened, the  
37 proponents of same sex marriage might be on this day, it is worth acknowledging that they

1 have lost and lost forever. The opportunity to win the true acceptance that comes from  
2 persuading their fellow citizens of the justice of their cause. And they lose this just when the  
3 winds of change were freshening at their decks.

4

5 **CHIEF JUSTICE CHANDRACHUD:** Thank you, Mr. Solicitor.

6

7 **TUSHAR MEHTA:** Only last My Lords, it's my duty, My Lord. Therefore, I'm pointing  
8 out. At the outset I said that we have written letters to the state governments. My Lord, there  
9 are seven responses. I'm not reading them, from Manipur, Andhra Pradesh, Uttar Pradesh,  
10 Maharashtra, Assam, Sikkim, and Rajasthan. I'm placing them on record. Rajasthan takes the  
11 position that we have examined it and we are opposed to the position, My Lords, with the  
12 petitioners are taking. All rest say that this needs a very intense and expensive debate and we  
13 would not be able to respond immediately. We have received this. I'll file it on in the in the  
14 registry with copies to the other sidenotes. These are my closing submissions, but I'm just  
15 putting it on record. My Lord, I'm not reading them. They have one and a half page closing  
16 submissions followed. I'll place it on record.

17

18 **CHIEF JUSTICE CHANDRACHUD:** Yes. Dr. Singhvi.

19

20 **TUSHAR MEHTA:** My Lordships. Don't mind, My Lord. I know. It's little unusual. My  
21 colleague has amongst all worked me to the best, if he can be given some time for a few  
22 minutes.

23

24 **CHIEF JUSTICE CHANDRACHUD:** After you've concluded. Thank you. Yes, Mr. Singhvi.

25

26 **DR. SINGHVI:** Your Lordship has heard us very patiently. I've either been present or been  
27 made aware. Your Lordships may take it. I know My Lords the broad trends of the argument  
28 and I'll answer them one by one. From mere cohabitation to mere, I use the word mere My  
29 Lords, declaration of same sex marriage to a further declaration of same sex marriage valid  
30 under SMA, which is what I'm asking. There's a difference between my two and three My  
31 Lords. Same sex marriage valid under and through SMA. From that this whole my  
32 lords excessive to the point of being actually wrong, emphasis on legislative intent, put in five  
33 different ways. Go to the legislature, original intent, rewriting, judicial legislation, judicial  
34 surgery. I'll be dealing with all My Lords. I'm just saying, I'm cognizant of all that. Then to the  
35 what I call, we call this the scare argument. Oh, My Lord, how will it work? The workability  
36 argument. It's an attempt to create I'll be dealing specifically with the workability argument  
37 and then finally to the notice of objections. I will be very pointed. It may not happen in the

1 sequence My Lords would have want it, but I'll be covering all this. But my arguments are  
2 broadly under three heads. And Your Lordships may please kindly consider following those  
3 three heads, because they will come. Sometimes Your Lordship's query may relate to the third  
4 head, Your Lordships may be rest assured, I'll come there. The first head with great respect, is  
5 that a Constitution compliant reading.

6

7 **TUSHAR MEHTA:** We didn't respond to this. Your Lordship said will not go into this  
8 notice and etc.

9

10 **DR. SINGHVI:** My Lord. Did not give a judgment, Your Lordships made an observation.

11

12 **CHIEF JUSTICE CHANDRACHUD:** We are not going into it an that it is..

13

14 **TUSHAR MEHTA:** It is referred...

15

16 **DR. SINGHVI:** I argued it fully in the opening.

17

18 **CHIEF JUSTICE CHANDRACHUD:** As I recall, he said that this is common to, this is not  
19 specific to the same sex,

20

21 **DR. SINGHVI:** Heterosexual also.

22

23 **CHIEF JUSTICE CHANDRACHUD:** And therefore we said we'll not really deal with it, in  
24 this batch. We have petitions which are pending.

25

26 **DR. SINGHVI:** I argued it fully in the opening.

27

28 **CHIEF JUSTICE CHANDRACHUD:** But Dr. Singhvi, keep it aside, because we haven't  
29 heard them, others. We would have pointed out to them that they have missed out on that..

30

31 **TUSHAR MEHTA:** We did that purposefully...

32

33 **DR. SINGHVI:** That is, according to us, if Your Lordship has to hear them briefly on that  
34 tomorrow, My Lords that is the heart, the heart of our objections.

35

36 **CHIEF JUSTICE CHANDRACHUD:** One second, Dr. Singhvi, we have petitions which are  
37 pending specifically on this challenge. And the reason why we thought we'll not deal with it in

1 this batch of matters is, that that's a matter which is common to both heterosexual couples as  
2 well as to..

3

4 **DR. SINGHVI:** But Your Lordships observed when the, I argued it fully in the opening.  
5 The Lordships said that because it is common, I said that merely because it is common to  
6 another segment.

7

8 **CHIEF JUSTICE CHANDRACHUD:** It will be inherently unfair to the learned Solicitor  
9 and all those who followed on this side that they went by our telling them that we are not going  
10 to...

11

12 **DR. SINGHVI:** Can I just clarify.

13

14 **TUSHAR MEHTA:** I hear Your Lordships on the subject wise and we consciously decided  
15 that we...

16

17 **CHIEF JUSTICE CHANDRACHUD:** And in a sense, our suggestion really led them to a  
18 safe sense of that I'll deal with it.

19

20 **DR. SINGHVI:** No, no. I am My Lords, far be it from me to take a very natural justice from  
21 anywhere. That's not the point. Give me just two minutes. I raised it, argued it fully. In the  
22 course of arguments Your Lordships observed at which time only Mr. Ram Chandra was  
23 there, Mr. Grover were there. They protested that this is the heart of our claim. Your Lordship  
24 said, we'll take a call later. Now if procedure is violated Your Lordship certainly may hear  
25 them briefly tomorrow, but according to us the heart...My Lords I'll take only for a very short  
26 while on that. I've argued it fully in the opening. Your Lordship's point was that if heterosexual  
27 couples to whom this regime equally applies are not present before us, should we not take it  
28 separately? That was a short point made. I have dealt with it fully in my written  
29 submissions. Your Lordship's test is a positive test.

30

31 **JUSTICE BHAT:** Doctor Singhvi, just answer this. We were not here when the reference was  
32 made. There is no reference order per se. The order was implicit on this premise that the claim  
33 for same sex marriage was being considered. The court, to be fair to the court, nobody pointed  
34 out these nitty-gritties of the claims, the details of these claims, or even Section Seven SMA.  
35 Therefore, to stand up and say we have been heard. Then please insist that... insisting that we  
36 must be heard and you must have a ruling is not up to you. Because see orders

1 [UNCLEAR] There is a consensus. The consensus was that let the same sex marriage claims be  
2 heard.

3

4 **DR. SINGHVI:** Can I just say? Your Lordship will recollect, I argued almost for half an hour  
5 on this issue in the opening.

6

7 **JUSTICE BHAT:** You did.

8

9 **DR. SINGHVI:** After that ultimately the only issue that Your Lordships have  
10 heard them. Your Lordship may hear them briefly because Your Lordship's test is... Give me a  
11 minute. My Lord, the Chief Justice's observation. I just want to take two minutes on that.  
12 Your Lordship's test is that, is an identifiable class genuinely aggrieved with locus before  
13 me? If I genuinely aggrieved identifiable class like me, which is directly aggrieved by that is,  
14 before Your Lordships, then Your Lordship will not hear me on the basis that another class  
15 also is not before Your Lordships. The only issue heterosexual couples we are not concerned  
16 with. We are saying that the notice and objections regime, ultimately boils down to this.

17

18 **CHIEF JUSTICE CHANDRACHUD:** Let me put it this way. One second, there's another  
19 problem. Your argument in the challenge to the notice provision postulates a verdict in your  
20 favour that there is a right to marry under the Special Marriage Act.

21

22 **DR. SINGHVI:** Of course.

23

24 **CHIEF JUSTICE CHANDRACHUD:** All right? Now, therefore, the question as to  
25 whether, otherwise a notice provision doesn't apply to same sex couples at all. Right?  
26 Therefore at the highest and I am taking your argument at it's highest. This will... your  
27 challenge to Section seven and ten has to be deferred to a point when we have ruled on the  
28 legality of the same sex marriages.

29

30 **DR. SINGHVI:** I say why, that might not be correct. Just give me a second.  
31 Your Lordship will the first step have to see whether I am same sex marriage recognized  
32 under SMA. That is what My Lord is observing. That gives me access to marriage  
33 under a secular agnostic statute called SMA. It does not give me equality with my...

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35 **CHIEF JUSTICE CHANDRACHUD:** Doctor Singhvi, you have to argue on a demurrer.

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37 **DR. SINGHVI:** Yes.

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**CHIEF JUSTICE CHANDRACHUD:** You have to say that even assuming that you are not with me on the same sex marriage issue even then, my challenge to Section seven and ten will survive. Can you say that?

**DR. SINGHVI:** No. But that is not we arguing My Lords. I'm arguing on the basis of both. I'm arguing cumulatively. I'm entitled to say..,

**CHIEF JUSTICE CHANDRACHUD:** But you were heard in your petition seven and ten, if you are right in saying that even if you hold against me on the first point, my second point will survive. Your second point is really dependent on the view which...

**CHIEF JUSTICE CHANDRACHUD:** I bow down.

**CHIEF JUSTICE CHANDRACHUD:** And therefore at the highest what we can do is this.

**DR. SINGHVI:** The two are inextricably intertwined.

**CHIEF JUSTICE CHANDRACHUD:** At the highest what we could do is this. Assuming because we are now testing the hypothesis. Assuming that we give a declaration as that you want, that you are entitled to a right to marry under the Special Marriage Act, that there is a right to marry so on and so forth. We can see that this particular issue will be dealt with separately, in a petition which you will file or in the pending petitions where you may have intervened.

**DR. SINGHVI:** Pending petitions are there on this specifically. Mine, Mr. Raju Ram Chandar's, others My Lords. All directly already pending here. And they were mentioned and they were added...

**CHIEF JUSTICE CHANDRACHUD:** Because notice applies to those who are entitled to marry undoubtedly because that's why heterosexual couples there's a Square challenge. We can't hear your challenge unless we rule on your basic point.

**DR. SINGHVI:** I leave it to Your Lordships with two points.

**JUSTICE KOHLI:** Dr. Singhvi, we might be putting the cart before the horse, in that sense of the word.



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**DR. SINGHVI:** May I just say this? I will leave it as that. Let me state my point and I will leave. My point is Number 1, Your Lordships would decide certainly the declaration part under SMA. Number 2, my point is, I bow down, my second point of notice and objection arises only if Your Lordship holds me eligible under SMA, no doubt. However, I say that, if Your Lordship so holds in the first part, the other is inextricably intertwined. It follows, it's consequential, without that much of my right is hollow. And thirdly, the ultimate objection to this is what, we are in the Supreme Court. Your Lordship will hear another combination. But the only objection is, that he has not argued. Your Lordship will give him a fixed time, half a day, will finish it off tomorrow. Because I have already argued, we will take less than. At the end of the day, Your Lordship is rightly concerned about natural justices. And I am not suggesting Your Lordship violates that. That's the only way to put it. Otherwise, I leave it to My Lord. Because it 's a very, very, I mean, I will show at the end ten minutes, why, My Lords, assuming Your Lordships were to give me a declaration, that I am a same sex, valid marriage under SMA. The vulnerability, the practical operation, the invitation to violence, will make that right 50% to 70% illusory. That's the reason. Your lordship completes the, obviously My Lords, doesn't hold me to your first part, there's no point. Your Lordships doesn't have to bother. What will, at the end of the day, what is the objection? He didn't get a chance to argue. According to our understanding, I was not here. My learned friend tells me, Lordship said we will see later. Your Lordship did not exclude the point,

**MR. RAMACHANDRAN:** For a particular reason which I will explain later.

**DR. SINGHVI:** You did not exclude the point. Therefore, I suggest, at least let me finish my argument on that, whatever little argument I have. Your Lordship may accommodate him in. It's a very short point. He can show those sections and then Your Lordships may have a little bit of spill over...

**JUSTICE BHAT:** Dr. Singhvi, with due respect.

**DR. SINGHVI:** Sorry, yes.

**JUSTICE KAUL:** Dr. Singhvi, what is being suggested to you is, let the Bench rule on the principle aspect. Are you entitled to the declaration of a marriage or not? You are talking about the right, post that being illusionary in some manner because of consequences which may flow. It's not that, you are being shut out of that right, to argue that.

1 **DR. SINGHVI:** I appreciate My Lords, I appreciate.

2

3 **JUSTICE KAUL:** Only thing is that, it has been felt that, since it's an inter linked issue both  
4 for, the same sex marriage as well as the heterosexual marriage. It may be more appropriate  
5 to hear that out, in a particular manner, looking to both sex of the people. I don't think that  
6 should trouble you so much.

7

8 **DR. SINGHVI:** I cannot say more than that. I will leave it at that.

9

10 **JUSTICE KAUL:** There are only two things which can happen. One is, you get a  
11 declaration, in which case you are heard in the second aspect. Second is, don't get a  
12 declaration, then really you can't argue that. <UNCLEAR>

13

14 **DR. SINGHVI:** I appreciate what My Lord is saying. I bow down to it. I will not say more. I  
15 made my three points. Whether Your Lordship, then, still would want to hear it, at a  
16 subsequent hearing, that's Your Lordship's prerogative. But I would still say that, Your  
17 Lordship, would consider seriously my three submissions as to why Your Lordship should  
18 hear it in this Bench. I don't want to, I want to move on. now on the main matter.

19

20 **CHIEF JUSTICE CHANDRACHUD:** Now on the main matter, you said you have three  
21 points, basically, three heads.

22

23 **DR. SINGHVI:** Third was this, My Lords.

24

25 **CHIEF JUSTICE CHANDRACHUD:** What is the...?

26

27 **DR. SINGHVI:** Third was this. The first is, there are the constitution compliant reading of  
28 the Special Marriage Act, is within the bounds of legitimate statutory interpretation, that's the  
29 first head. They are the heads. It is neither judicial surgery nor judicial legislation.

30 There are seven, eight major points under this. I will itemize them and go one by one under  
31 them. My second major head is, to assure Your Lordships, and assuage all the needless  
32 apprehensions created, to show to Your Lordships, that the relief I seek, in one sentence, "I  
33 am a valid, recognizable same sex marriage under SMA". That's the proposition. My second  
34 head of submission is that, the relief I seek is workable. So the workability head. And neither  
35 requires, and neither requires this Honourable Court to create any new social  
36 institution, many of these are phrases picked up from the Respondents. Nor to have a new  
37 definition of marriage, nor to have a new definition. These are all again phrases by

1 the Respondents. Your Lordships will be creating a new definition of marriage. Your  
 2 Lordships will be creating a a new social institution, nor thirdly, nor entering into any thicket  
 3 of personal law or other related laws. My third set of head, Your Lordship noted.  
 4 Lordship may decided to hear it now or later. Just note the head. I mean, this is a...that the  
 5 Prayer for striking down the notice and objection regime, of the SMA , the Prayer for striking  
 6 down the notice and objection regime, of the SMA, is an essential and indivisible  
 7 component, essential and indivisible component, of my prayer for marriage equality. My  
 8 whole case is about marriage equality. This is an essential and indivisible component of that  
 9 prayer for marriage equality. Your Lordships, without this third head would have granted a  
 10 recognition of same sex marriage, but not equality. It would be a recognition of same sex  
 11 without equality. We are seeking two things. One is marriage equality, Your Lordship would,  
 12 in some sense, grant marriage, but not equality, without this. That's why it's important. And  
 13 as My Lords rightly says is without recognizing the extreme vulnerability of the class which  
 14 faces this notice and objection regime, much of the relief might be made illusory. It's a very,  
 15 very clear, strong, special vulnerability. I will stick to these three heads. I'll start with the first.  
 16 All these are points under the first.

17 [NO AUDIO]

18 My lords, just two sentences on what's the heart of my claim and prayer and then we come to  
 19 the first head, straight away. As I've said we not only seek or we do not merely seek a  
 20 declaration of the right to marry which is one way of putting it. Of course, the Solicitor opposes  
 21 even that. One particular class of Respondents said, yes, you may give that, but not go further.  
 22 We do not seek merely a declaration of their right to marry but a right to marry under the SMA  
 23 by an interpretation of the SMA, which would allow for solemnization and or registration of  
 24 non-heterosexual marriages. That's the heart and the complete case. Therefore, what we seek  
 25 is a right to access on equal terms. We are seeking a right to access this social institution called  
 26 marriage and on equal terms. The irony is my learned friends, accepts, that this is a very  
 27 sanctified social institution. People must have access but they say not you and not on equal  
 28 terms.

29

30 **JUSTICE BHAT:** Through law.

31

32 **DR. SINGHVI:** So, My Lords, in a nutshell, this case is about interpretation to apply an  
 33 existing law in a non-discriminatory fashion. There is no judicial legislation, no judicial  
 34 surgery. Your Lordships have done much, much more. Interpretation of an existing law, no  
 35 new law making but in a non-discriminatory fashion. Which has two components

36 (a), I should have a right to access on non-discriminatory terms

37 (b), on equal terms.

1 Now I come to my first head straight away. First head. My Lords the heart of this matter is  
2 what? Your Lordship I'll deal with this bogey of excessive reliance on the legislature. I'll be  
3 dealing with this constant argument. My Lords the Constitution... Just to digress for 30  
4 seconds, the Constitution is Supreme because Your Lordship interpret entrenched rights in a  
5 counter majoritarian manner against the majorities. Every day Your Lordship hold  
6 Constitution about interpreting and applying entrenched rights against the majorities, against  
7 elected legislatures, against electoral majorities which from the Framers' time thought could  
8 become tyrannical and dictatorial. Otherwise, there'd be no Constitution. This constant  
9 hearkening that you are as judges, unelected judges who enforce entrenched constitutional  
10 rights against elected legislatures because our constitutional forefathers said that many rights  
11 are entrenching precisely because they have to be a counter majoritarian against elected  
12 legislature. What is so great about a legislature? Now, My Lords kindly go one by one with this.  
13 Therefore consequently...

14

15 **JUSTICE BHAT:** Except very small, very small detail. The Legislature is the one which has  
16 created this SMA.

17

18 **DR. SINGHVI:** Yes.

19

20 **JUSTICE BHAT:** If you rewind and there were no SMA. Where would that right flow?

21

22 **DR. SINGHVI:** That is very simple. Let us be very candid My Lords. We cannot keep fictions  
23 anymore. The Legislature made the Constitution. But it made the Constitution Supreme and  
24 a special majority to amend it. In other countries, that is enough to say, the Constitution is  
25 supreme, not the Legislature, not the Judiciary, not the executive. Here, Your Lordships, have  
26 put a super added basic structure on it. And who says what is basic structure?  
27 Your Lordships say that.

28

29 **JUSTICE BHAT:** That is fine. If we rewind to the position that existed before 1954?

30

31 **DR. SINGHVI:** Yes.

32

33 **JUSTICE BHAT:** Where could an interfaith couple come and assert that right? That is where  
34 exactly you stand today.

35

36 **DR. SINGHVI:** Now, My Lords, it's a very interesting year Your Lordship, is giving. I have in  
37 my written submission, even put a photograph for us. That's a very interesting year

1 Justice Bhat is giving. Brown versus Board happened around that time. There were people  
2 who wrote, that these are the documents of the Framers of the 14th Amendment, who said you  
3 can never have equal but segregated, the original intent was against. They said, we will now  
4 interpret it in accordance with evolving times and the photo I put in my submission, is an  
5 iconic photograph of 1960, with four white Marshals escorting a black guard. Purely, counter  
6 majoritarian. The 14th Amendment, <UNCLEAR> suggested that the original intent was not  
7 to allow this desegregation. And the judgment records it. It's a judgment, not in the  
8 compilations and a 90's judgment in 54 as Justice Bhat says, at that time, we are now My  
9 Lords, 75 years down the line, because it is evolving. I have got two other interesting  
10 examples which I do some research for this case. I am digressing, a very interesting  
11 example, Your Lordship would be shocked to know this. There were laws passed by legislatures  
12 of USA, the country which is the most advanced country in the world. One law said that male  
13 people below an IQ of X must be sterilized.

14

15 **JUSTICE BHAT:** Eugenics.

16

17 **DR. SINGHVI:** Because no, because you should not have a society of idiots. I mean My  
18 Lords, that's virtually what judgment says. That judgment was upheld. I am sorry, the law was  
19 upheld.

20

21 **CHIEF JUSTICE CHANDRACHUD:** Justice Home's.

22

23 **DR. SINGHVI:** Yes. Second example. Second example is very, very interesting and very  
24 relevant for today. The biggest change from my time, when I joined the profession is, among  
25 other things, that from being a refuge of last resort, law is an option of first choice. You would  
26 do My Lords, if you fail five exams and then come to law. Now it's an option of first choice.  
27 Secondly, people with no background in law, are coming to law. With no connections, fathers,  
28 grandfathers are coming to law. Third, greatest example is women, the number of  
29 women when some of us started a profession and now, it's radically different. The second law  
30 passed in USA was, the women should be barred from joining the legal profession because of  
31 the roughness of the profession, women are not suited, also upheld.

32

33 **JUSTICE BHAT:** We were the first to do away with that.

34

35 **DR. SINGHVI:** I beg your pardon.

36

37 **JUSTICE BHAT:** We were the first to do away with that.

1

2 **DR. SINGHVI:** That time were much more advanced. Now these are therefore, this whole  
3 concept, original intent, legislature. It is unelected judges who are the masters of  
4 interpretation of the Supreme Court, of the Constitution. The whole idea is to entrust that  
5 power to a class of people who are not buffeted by the majoritarian trends or the majoritarian  
6 ethos of a time, which can at times be tyrannical and dictatorial. Part Three is nothing but a  
7 countermeasure in part three. What is part three? It's an entrenchment against the  
8 majority. Articles 25, 26, 27, 29, 30, are nothing but counter majoritarian. So it's no point  
9 repeating. Yes, if Your Lordship finds that the Ghaidan, which is completely miss test. I am  
10 asking ten units ahead of Ghaidan. Then it might be judicial legislature but it should not do  
11 it. But don't not do it because the legislature may do it. That's not a valid  
12 reason. If Your Lordships find that, Your Lordship has to do much more than  
13 even Ghaidan allows, then Your Lordship may not do it. If Your Lordship finds that this is not  
14 a correct thing to do, Your Lordship may not do it. But please, don't be swayed by this  
15 constant, constant, majoritarian argument. Elected legislature, unelected judges, majorities  
16 with the whole advance of law is replete with examples to the contrary. There would be no  
17 advance in the law. And we are now talking of Brown versus Board of 1954- 55.

18

19 **CHIEF JUSTICE CHANDRACHUD:** You just said that if you feel that it's not a correct  
20 thing to do, then don't do it. Or in other words, if you feel that it is a correct thing to do it, then  
21 by all means do it. The problem is that.

22

23 **DR. SINGHVI:** Even there within limits.

24

25 **CHIEF JUSTICE CHANDRACHUD:** The problem is that, the Court decides these issues  
26 of correctness or otherwise when they are essentially issues of legislative policy, legislative.

27

28 **DR. SINGHVI:** Your Lordships knows it better than us. Your Lordship has done  
29 much, much more in the course of interpretation.

30

31 **CHIEF JUSTICE CHANDRACHUD:** The judge decide, does a judge decide that this is  
32 correct and therefore we will do it or is this something which properly call this for the  
33 legislature to decide whether it is correct?

34

35 **DR. SINGHVI:** I would even go so far as to say that there is a value judgment involved in all  
36 these cases. Was Navtej not a value judgment My Lords? Why is Navtej is not a value  
37 judgment?

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**JUSTICE BHAT:** No Dr. Singhvi, Navtej was, the Court was within its constitutional bounds.

**CHIEF JUSTICE CHANDRACHUD:** It was challenged, the validity was challenged.

**DR. SINGHVI:** It was challenged by reading down that Article 14 and 15 excludes me on ascriptive characteristics. That's the one sentence summary of this case, Your Lordship, is preventing discrimination, which is practiced by the application of discrimination, against me on ascriptive characteristics directly for ..

**CHIEF JUSTICE CHANDRACHUD:** Therefore, let's understand your submission. Your argument is that any notion of marriage as a social institution which excludes same sex couples would be violative of constitutional precept. Alright?

**DR. SINGHVI:** In particular 14,15 etc.

**CHIEF JUSTICE CHANDRACHUD:** That's right. Their argument is that marriage is conventionally understood. Correct? Is a heterosexual Union between man and woman. Correct? You are saying now, in order to make it constitutionally compliant, read that social institution, as also comprehending within its fold, the Union between a same sex couple. That's very different from what we did in Navtej.

**DR. SINGHVI:** No without one ground. One of the grounds of an ascriptive characteristic, One of the grounds...

**JUSTICE BHAT:** You started the debate by saying that this Special Marriage Act provisions are void. You have not... thereafter you've brought in ..

**DR. SINGHVI:** Kindly Justice Bhat, let me, give me a minute. It's very important. Kindly see My Lord, what Justice Bhat has just formulated. Therefore, I could enter the gate with a voidness challenge, SMA.

**JUSTICE BHAT:** Yes, you could.

**DR. SINGHVI:** Yes. Can I not ask for lesser. Your Lordships...

1 **JUSTICE BHAT:** It's not a question of lesser. Question is you should be able to say this is a  
2 wrong classification. I'm taking it head on, strike it down.

3

4 **DR. SINGHVI:** With respect, with respect the striking down would be on the same articles.

5

6 **JUSTICE BHAT:** This is a very artful way of putting it. If I may say so. This is very artful. You  
7 are not making.. You're saying that there is a classification which is illegitimate. But you are  
8 not willing to take it that far because you have no locus. You have no locus. You are  
9 establishing, you wanting to establish a right by opposing a negative. That this is void..

10

11 **DR. SINGHVI:** So let me meet both those points. It's very important part of it. Number  
12 one, I am entitled to challenge it on the ground of discrimination and an arbitrary exclusion.  
13 But the consequence My Lord is saying, must be strike down. My Lords if Your Lordship  
14 within the bounds of judicial review, if forget this case, are able to read down something. Does  
15 Your Lordship not 100 times uphold the act, by reading down? Forget this case. What  
16 should one do? Is the technique wrong?

17

18 **JUSTICE BHAT:** So, it is your proposition one. If I may say so is the classification there is  
19 valid. Now you want to push it forward and say it is a valid classification. But.

20

21 **DR. SINGHVI:** No, I'm not saying it's valid classification. I'm not saying valid classification.  
22 I'm sorry.

23

24 **JUSTICE BHAT:** In that case, heterosexual classification is not valid according to you.

25

26 **DR. SINGHVI:** I am saying, My Lords no. Classification which is invalid, becomes  
27 valid, by Your Lordship's reading, spouse, person everywhere. It can become valid, it does in  
28 every law.

29

30 **JUSTICE KOHLI:** But Dr. Singhvi, there was no argument of it being ever invalid. The  
31 argument was we need the same benefits as are flowing to those who are in marriage of a  
32 heterosexuals.

33

34 **DR. SINGHVI:** Otherwise the law would be bad.

35

36 **JUSTICE KOHLI:** But you never laid a challenge to the very statute.

37



1 **DR SINGHVI:** No, I am saying I am entitled not to raise.

2

3 **JUSTICE KOHLI:** Let me understand that.

4

5 **DR. SINGHVI:** Forget this case for a minute, as a proposition of law. My Lord, should  
6 not think that there is any sleight of hand. Just for a minute forget this case. As a proposition  
7 of law, am I entitled to come to Your Lordship's Court and say,

8 a.) I have direct locus. I'm directly agreed because I'm that class which is excluded. So there's  
9 no question of lack of locus. I am that class excluded.

10 b.) Second question, I am the class excluded because the exclusion occurs on ascriptive  
11 characteristic of gender or sex or identity.

12 c.) Third if Your Lordships finds that there is an exclusion, then while normally the law would  
13 be struck down, I am giving you clear, simplest, minimalist answers as to why a reading of  
14 person and same sex or spouse will validate the law. I don't want to change any other part of  
15 the law. Why am I compelled to challenge it's validity?

16

17 **CHIEF JUSTICE CHANDRACHUD:** Even if you were to challenge the constitutional  
18 validity of this Special Marriage Act, even if you were to challenge the  
19 constitutionality validity of the Special Marriage Act, that would be postulated on the  
20 hypothesis that any statutory recognition of marriage as being confined to a heterosexual man  
21 and woman is unconstitutional. In other words what you would then see is an expansion by  
22 the court of the very notion of marriage so as to include a class of relationships other than a  
23 heterosexual relationship. Right?

24

25 **DR. SINGHVI:** Absolutely.

26

27 **CHIEF JUSTICE CHANDRACHUD:** That exactly is the problem because then what  
28 happens is that the Court, in the course of reading down which you are then suggesting that it  
29 should be done. Would be reading down the statute in a manner which would expand the  
30 dimensional reading of social, which is what you see.

31

32 **DR. SINGHVI:** No, no. Call it reading up. I have no problem with that semantics. Call it  
33 reading up.

34

35 **CHIEF JUSTICE CHANDRACHUD:** Reading up or reading down. What then you  
36 are going to say is that look, the Special Marriage Act has taken notion. Taken account of  
37 marriage being a notion involving a man and a woman.

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**DR. SINGHVI:** Yes.

**CHIEF JUSTICE CHANDRACHUD:** This is unconstitutional.

**DR. SINGHVI:** Yes.

**CHIEF JUSTICE CHANDRACHUD:** In other words, actually, if you stretch it further that any notion of marriage itself being a Union between a heterosexual man and a woman is itself unconstitutional.

**DR. SINGHVI:** Now, can I just answer that?

**CHIEF JUSTICE CHANDRACHUD:** Now can we go down that far and say that look, the very social institution of marriage as including a relationship only between a man and woman is unconstitutional. Even you won't take it that far.

**DR SINGHVI:** We are saying in the event that you are...

**CHIEF JUSTICE CHANDRACHUD:** As a social custom.

**DR. SINGHVI:** No My Lords we are saying that...

**CHIEF JUSTICE CHANDRACHUD:** It's amenable to Article 13.

**DR. SINGHVI:** My Lords, I'm sorry.

**CHIEF JUSTICE CHANDRACHUD:** You haven't also taken it that far, and you won't take it that far. What is your next line of argument that by recognizing marriage only in terms of a relationship between a man and woman, the Legislature has infringed all 14 or 20?

**DR. SINGHVI:** All that we are saying is, that if you continue to read SMA to exclude same sex couples then the SMA as a legal proposition is unconstitutional under 14, 19, 15 and 21. Just allow me. I've heard Your Lordships loud and clear. First point, marriage as a legal institution needs my access on equal terms as heterosexual couples. My stoppage of access and also not on equal terms is my violation of 14 and 15. Doesn't stop here.

1 Your Lordship's next question is, everything different is not unconstitutional. Let us see, what  
2 is the difference based on. That's question number Two in an Article 14 analysis. My answer  
3 to question number two would be that this differentiation, which leads to the exclusion of same  
4 sex couples, is based solely on ascriptive characteristics. Solely.

5

6 Question Number three, if it is so then normally it's exclusion must be struck down. My  
7 Lords kindly bear with me. I'm answering Your Lordship. The exclusion must be struck down.  
8 Now that may lead to situations of inclusion. Inclusion....

9 [NO AUDIO]

10

11 **CHIEF JUSTICE CHANDRACHUD:** So this part we've understood your submission.  
12 What's the next?

13

14 **DR. SINGHVI:** So first the analysis doesn't stop at 3. So First is, is there a differentiation  
15 exclusion? If there is, is there a valid basis for it? These two I've made My Lords. Third still  
16 remains. Overall is it something which Your Lordship should not do after the first two?  
17 Reading up or reading down, because of an original intent prohibition. Answer clearly has to  
18 be no. Your Lordships have never followed the original intent in that sense in this  
19 country. Fourth.

20

21 **JUSTICE BHAT:** Dr. Singhvi, during the hearing on behalf of the petitioners, I think we had  
22 trodden on this ground and even moved on. And if I recollect rightly. You said that you would  
23 not urge any interpretation which does violence to the other provisions of the statute.

24

25 **DR. SINGHVI:** That's the workability.

26

27 **JUSTICE BHAT:** That's where you ended it and the others took over. So now please focus  
28 on what is your core argument.

29

30 **DR. SINGHVI:** That's the workability part, I am just coming. That's the workability part. I  
31 will be showing, chapter and verse, the workability because that is told to Your  
32 Lordships. Today, I am only on this. On the first part. A mere declaration of marriage or a  
33 declaration of a valid recognized marriage under SMA. That's the debate in the first head.  
34 I have not come to the second head yet. In the first head, it is our case that  
35 Your Lordships, must recognize same sex marriage on these legal basis under the SMA. And  
36 for that Your Lordship, has ultimately in the fourth test or the third test, only to see, that does  
37 an original intent bind you? There is no such Doctrine in India. Is there overall, a policy of the

1 law? My Lords the language is, "it is permissible for a court to depart from the specific intent  
2 of the legislators as long as the proposed interpretation is consistent with the underlying thrust  
3 of the statute and within the institutional competence of the judiciary". If Your Lordship is  
4 validating this test, by all means, I am out of the first test. I have a quote from Ghaidan. I have  
5 just read, this part. Ghaidan was much misrepresented, factually different, contextually  
6 different. I started when I philosophically recollect. My arguments, of course it is. I cited it for  
7 the Interpretive Doctrine of Judges not being bound by sterile doctrines of the original intent  
8 or the specific intention of the legislators. That is the only reason I try to.

9

10 **JUSTICE BHAT:** We don't need to go to Ghaidan. We have our own  
11 homegrown, Ratan Arya, and...

12

13 **DR. SINGHVI:** Your Lordships have in fact, travelled much more, that was  
14 the English case, without the constitutional dynamics of this country. So, Your Lordships  
15 reading up and reading down in a much bigger way, is commonplace. Your Lordships, in  
16 particular approval of My Lords, S.G. Choudhury, which is in footnote one and one  
17 more judgment, Lakshmi Video. They are all in my original compilation.  
18 Your Lordship knows S.G. Choudhury is in my compilation, Volume 2, at page 7094  
19 and Lakshmi Video is in my compilation 4, Volume 2, at page 4510 held this simple  
20 proposition, which is sufficient. Application of a statute, ought not to be forever circumscribed  
21 by the range of concrete circumstances, that is framers intended it to apply to. This is  
22 Your Lordships, 60s Doctrine. Ghaidan was one. I have given Your Lordships enough Indian  
23 law before that. Therefore, I submit.

24

25 **JUSTICE BHAT:** There's an old one on 14. I think it's Jia Lal. Jia Lal is I think we won where  
26 those living on the other side of the Jamuna were not allowed to hold an arm's license. And  
27 that rule was created during the aftermath of the mutiny. I think 61 or 62. The Court said  
28 that, what is this classification? See that which was valid because the insurgents were holding  
29 arms, they were concentrating in Meerut and that side. So they wanted to stop that.

30

31 **DR. SINGHVI:** So that was a contextual thing of that time. I go on, on this to say that  
32 Your Lordship, will then juxtapose it with the agnostic thrust of the SMA. Why was  
33 the SMA created? Today, after 70 years of the Republic after . 75 years, we have a recognition  
34 that the numbers of same sex or queer people is very large. They were always there. But they  
35 were not understood and recognized as a community. That they existed. There was fear on  
36 both sides, both on the heterosexual side and on the homosexual side. There was inhibition.  
37 Today what is this case about? That Your Lordship provided a secular, agnostic platform for

1 heterosexuals. Forget this category. SMA's entire birth from two things, the long title and  
2 the SOR. I am not showing it again and My Lords the text, especially four, Section 4. The  
3 whole purpose, therefore My Lords, if the SMA was designed to facilitate  
4 marriages, actually SMA was in that sense, not as much, I would say, but a very significant  
5 advance, not so much as recognizing same sex today, but a very significant advance because it  
6 was also dealing with marriages outside the pale of social acceptability. Social acceptability is  
7 the heart of SMA. Your Lordships wanted to create a platform for social acceptability. Not  
8 there for heterosexual couples.

9

10 **CHIEF JUSTICE CHANDRACHUD:** Now just a little look at the clock. We don't want to  
11 keep it beyond the vacation. We have about 50 minutes. We'll rise at about 4:15. So between  
12 all of you please ration the time now.

13

14 **DR. SINGHVI:** Tomorrow....My Lords give me some time. Your Lordship do one thing, rise  
15 at 4 o'clock, give me about half an hour-45 minutes tomorrow we'll finish by this  
16 side. Workability. This is a matter of last, rejoinder is the last stage. We want that time.

17

18 **CHIEF JUSTICE CHANDRACHUD:** Thing is tomorrow is a crowded morning. We have a  
19 reference, then we have two Constitution Bench judgments, which we are announcing  
20 tomorrow plus today we had only 240 mentionings in the morning. 276, sorry . And then we  
21 have all in there.

22

23 **DR. SINGHVI:** This is our last slot, on a lighter way...

24

25 **JUSTICE NARASIMHA:** Because we have heard it for such a long time this will be faster  
26 towards grasp it. You just formulate it and then tell no.

27

28 **DR. SINGHVI:** I'm formulating it as I go along. I'm giving Your Lordships only a very  
29 discrete point. I'm not repeating a point because, this is a matter of some moment.  
30 Your Lordships will give me some time tomorrow I'll be very pointed and My lords, can give  
31 me time from 12:00 for this matter or from whenever Your Lordships finishes.

32

33 **CHIEF JUSTICE CHANDRACHUD:** What we could do is this because tomorrow's  
34 schedule is really, I mean, I must share it with you. We have the reference which we anticipate  
35 would be 10:30 to 11 maybe perhaps a little longer. Then we have two  
36 Constitution Benches. We will give 20 minutes for that mentioning, half an hour. So we would

1 be able to afford it by 12 o' Clock. So twelve to one, then everybody will have to wrap up  
2 between twelve to one.

3

4 **MUKUL ROHATGI:** We'll finish it by 1, one hour.

5

6 **MR. RAMACHANDRAN:** I just want five minutes now.

7

8 **MUKUL ROHATGI:** I want to give a suggestion. I want to give a suggestion

9

10 **CHIEF JUSTICE CHANDRACHUD:** Dr. Singhvi, if you could wrap up by say about 3:50,  
11 then we can give five minutes each to Mr. Rohatgi and Mr. Ramachandran and then see who  
12 else remains. In one hour.

13

14 **DR. SINGHVI:** Well, let me, proceed as fast as I can if ..

15

16 **K V VISWANATHAN:** If Your Lordships can give me 20 minutes because...

17

18 **MUKUL ROHATGI:** if my learned friend take time tomorrow. Give us 5-5-10 minutes now  
19 and he can continue tomorrow.

20

21 **CHIEF JUSTICE CHANDRACHUD:** Now we are in the thick and the flow of Dr. Singhvi's  
22 arguments.

23

24 **DR. SINGHVI:** Let me utilize this time at least, My Lords let me just go.

25

26 **CHIEF JUSTICE CHANDRACHUD:** All right, Dr. Singhvi.

27

28 **DR. SINGHVI:** Now, My Lords therefore, Your Lordships provided a platform beyond social  
29 acceptability for heterosexual couples. All that Your Lordship has to see whether reading in or  
30 reading up within that social acceptability platform is beyond the pain of judicial review. That's  
31 the only test.

32

33 **CHIEF JUSTICE CHANDRACHUD:** That's the point.

34

35 **DR. SINGHVI:** I am not asking Your Lordships. I heavily disagree about judicial,..

36

37 **JUSTICE NARASIMHA:** What you are saying is Ghaidan methodology and...

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**DR. SINGHVI:** Not Ghaidan principle.

**JUSTICE NARASIMHA:** Whatever, it may be, he's equally permissible under the Constitution.

**DR. SINGHVI:** Now My Lords, kindly turn to para nine of my note, my written submission. I made a self-contained rejoinder...

**CHIEF JUSTICE CHANDRACHUD:** In rejoinder.

**DR. SINGHVI:** It has got my name on the top. Rejoinder submission by so and so. Now My Lords have you got it?

**JUSTICE KOHLI:** Give us a moment. Dr. Singhvi we are still looking.

**DR. SINGHVI:** Para nine at page five.

**JUSTICE KAUL:** Is it by way of the conclusion on this point Dr. Singhvi, does it begin like that?

**DR. SINGHVI:** Correct. Justice Kaul has got it. Para 9 is My Lords at page 5.

**JUSTICE NARASIMHA:** It's a 37 page document.

**DR. SINGHVI:** This is annexure. It is only 15 pages. It is only 15 pages. 19 pages I am sorry. Rest is My Lords appendix. Now My Lords just come to nine.

**CHIEF JUSTICE CHANDRACHUD:** Is there rejoinder folder, it's a part of written submission? It came at lunch.

**DR. SINGHVI:** Let them locate it first. Justice Kaul and Justice Bhat have got it. Justice Narasimha also has it.

[NO AUDIO]

**DR. SINGHVI:** Para nine at page five. Internal page five. In the middle. It was never in dispute that when the 14th Amendment was enacted in 1868, it's framers did not intend it to

1 apply to desegregation. Indeed, it is popularly recounted that, many legislators who supported  
2 the Amendment, supported segregation and the separate but equal Doctrine. In Brown,  
3 however, the US Supreme Court discounted the specific application intent of the framers and  
4 asked itself instead, what the principle of equality required of it, by way of constitutional  
5 interpretation. Similarly, petitioner's interpretation of the SMA, focused upon the underlying  
6 thrust and the principle of recognizing and legitimizing marriages, unsupported in social  
7 conventions, upon which the SMA is founded. Rather than asking how the framers intended  
8 to decide? That question is wrong, I say with respect. Now I am putting that  
9 photograph, I have said, anti-majoritarian impulses, unpopular, I will skip para 9(A). But  
10 that's an iconic photograph, 1960s. Come to para 10. Petitioners respectfully submitted the  
11 remedy, does not involve any judicial surgery nor the creation of a social new institution, nor  
12 a claim for legislation. These are words used by the Respondents. Now kindly see what it  
13 involves. Rather, the issue before this court is, one of discrimination of non-heterosexual  
14 persons from an already legally defined, legally defined institution, on the basis of the  
15 prohibited markers under Article 15. One thing more. Your Lordship is told social  
16 institution, today it is more a legal institution. Because Your Lordship, under the SMA, is  
17 excluding personal laws. It's a misnomer to again and again bring this scarecrow argument of  
18 personal laws. It's a legal institution under SMA. Not a social institution. I am not saying  
19 marriage is not a social institution.

20

21 **JUSTICE BHAT:** It's not as absolute

22

23 **DR. SINGHVI:** Not as absolute.

24

25 **JUSTICE BHAT:** It is enabling the marriage, but it is also assimilating the...

26

27 **DR. SINGHVI:** I bow down. I don't want to use the word absolute. My Lord is absolutely  
28 right. That, I am not going that far. I am just saying, a large amount of that social institution  
29 part, has been circumscribed by legal construct, which is what SMA is. Prior to that, Your  
30 Lordship could not venture there without personal laws. That's the point I am making.  
31 Now just see the middle of para 10, is very important. I have taken the liberty of highlighting  
32 it. A right to marry, along with a scheme for its implementation already exists. Petitioners are  
33 only asking for a non-discriminatory access to their existing right and institution. Indeed,  
34 petitioner's request is modest. It is to interpret certain provision of SMA in a manner that is  
35 both Constitution compliant and consistent with the SMA's own underlying thrust. Contrary  
36 to the Respondent's submission, this does not involve the Court in altering the meaning of  
37 words or the meaning of marriage. It only brings into the ambit of the SMA, a class that was



1 unconstitutionally hither to, excluded. Your Lordship is, just pause here. I am not on the notice  
2 of objection. Your Lordship is now being told, an equation between right to marry, a  
3 declaration to marry versus a declaration to marry under SMA. Cicero's words are important.  
4 Cicero said, "a book, a room without books is like a body without a soul". Your Lordships is  
5 being asked by the other side, that you recognize an abstract right to marriage without  
6 anything under the SMA, is really being asking for a body without a soul. That's my  
7 submission. That I have said in para 10, 'A'. We have a quote, in the top of my submissions,  
8 which I need not, Mary Robinson, President, Ireland, "the promises of human rights are like  
9 empty shells if they are not backed by concrete actions and meaningful change". May I say,  
10 what is Your Lordship being asked? Give a declaration of marriage, but nothing to do with the  
11 SMA. These two words. empty shells apply, body without a soul applies clearly. Now 10 (B).  
12 I have said Legislative majorities did not decriminalize. Forget 10 (C). Come to 10 (D). 10  
13 (D) for a minute. It is respectfully submitted that legislative will is not necessarily a neutral,  
14 objective or meritorious manifestation of desired constitutional objectives and constitutional  
15 morality. The Constitution is supreme precisely because in many areas it digresses from the  
16 wishes of mere electoral majorities, the Zealous Guarding and upholding of several minority  
17 rights, including it's many nuances is crucial precisely because electoral majorities are  
18 presumed to be wrong, tyrannical, or oppressive at certain times. So, this is an excessive  
19 misplaced reliance on elected majorities and unelected judges on the other side of the  
20 equation. Now, let's go to workability. Which is the heart of the matter, because I must assuage  
21 all these huge apprehensions, which I'm going to show Your Lordships are largely red  
22 herrings, created, to create some kind of fear issue that oh! what is My Lordship's being asked  
23 to do? How far Your Lordships will go? Now please see, the main part of this workability or  
24 lack of workabilities personal laws, that Your Lordship is being dragged into Personal laws.  
25 Just bear with us. This is a little important and I go to slow. Just come to the third line of 11,  
26 in particular, Section 19 of the SMA, severs ties of persons of Hindu, Buddhist, Sikh, or  
27 Jain religions married under SMA from their undivided family. At the same time, 21 provides  
28 a succession to the property of any person married under SMA is under ISA. Now the main  
29 argument on which, on a very tenuous thin argument, it is argued by Respondents is the last  
30 five lines. Respondent's argue that 21(A), of the SMA carves out an exception for marriages  
31 among persons of these four faiths, stating that they remain members of their undivided  
32 families, last four words, thus linking them back to religious and personal laws. Now I'm trying  
33 to answer this first point.

34

35 I've given two important tables in para 12. Just see the first table, prior to 21 (A), the entire  
36 argument is 21 (A) brings back a very minimalist, but a small amount of personal law. Now,  
37 prior to 21 (A) is my first table. Everything is ISA. Let's kindly go a little slow, it is very

1 important to remove these apprehensions. Everything in my first part of the table is ISA. ISA  
2 is supposed to be an agnostic civic, secular law which goes in tandem with this equally agnostic  
3 civic, secular law like SMA, there is no Hindu ,Muslim personal law involved. And the first  
4 part, even for Hindus, is well as a severance from the HUF. All the columns are ISA, ISA,  
5 Muslim, Christian, everything. Now after 21 (A), it remains the same, except for a Hindu  
6 couple. I hope I'm clear with this? Except for a Hindu couple. The second part of my table is  
7 identical to the first part. Yes. Therefore, take it slowly. I'm dealing with that. Petitioner  
8 Submits that 21 (A) does not create a barrier to a constitution Compliant reading. 21 (A) only  
9 applies for marriages of two Hindus, further, even when two Hindus marry under SMA 21 (A),  
10 links the SMA regime to personal law for only two narrow aspects. The whole case should go  
11 out of SMA because this argument was responded. Succession and membership of HUF, that's  
12 all. So 21 (A) is a limited to succession and HUF. Second limited to two Hindus. Now kindly  
13 come to my answers. I am respectfully submitting three possible interpretive answers and your  
14 Lordships says I am neutral to all. I have a personal choice. It doesn't matter. There are people  
15 here with other people. All three according to me, it's a scare argument to say that so much big  
16 is happening, whereas these three, any one of them Your Lordship's choice answers it.  
17 Firstly, theoretically, this Honourable Court may elect not to pronounce on the applicability of  
18 21 (A) to non-heterosexual Hindu couples in the present litigation and leave questions of  
19 succession open for future litigation expressly. There's only option one.

20

21 See option two. Secondly, in the alternative, the Honourable Court may hold that the SMA will  
22 apply to non-heterosexual couples, as exactly as applies to heterosexual couples. Today, Your  
23 Lordships has been applying it to heterosexual couples. By virtue of the introduction of 21 (A).  
24 Specifically Hindu non heterosexual couples will be governed by the HSA, just like Hindu  
25 heterosexual couples. But all non-Hindu, Christian, Muslim will be governed by ISA. This is  
26 number two.

27

28 **CHIEF JUSTICE CHANDRACHUD:** But to achieve this reading, now what follows? What  
29 do we have to do?

30

31 **DR. SINGHVI:** Is Your Lordships shy of doing this, minimalist interpretation will be the  
32 question. That's a valid. If I'm asking for, something which Your Lordship has never done  
33 before or is unknown to Your Lordship, it is right? I submit. This is a minimalist. Would you  
34 see that? Yes. Next para. Next. This is minimalist. This is my submission. To achieve this  
35 reading, the Honourable Court may extend its gender neutral reading of the SMA to  
36 the HSA and the ISA. That all that Lordships do. What if it has to hold. One, widow and  
37 widower in the ISA and male Hindu and female Hindu and widow and widower in

1 the HSA shall be interpreted in a manner that is agnostic of gender and sexual orientation.  
2 That too My Lords, there are two options by specifically saying Personal law is out.

3

4 **CHIEF JUSTICE CHANDRACHUD:** Does it really have to then, recast or redraft the  
5 provisions of the Hindu Succession Act also.

6

7 **DR. SINGHVI:** No, no, Your Lordship does not have to recast it. Your Lordship has to  
8 say...No, no, no My Lord is only in SMA. My Lord is not going to HSA. My Lord is saying either  
9 of two things..

10

11 **CHIEF JUSTICE CHANDRACHUD:** You are saying to achieve this reading..

12

13 **DR. SINGHVI:** Yes.

14

15 **CHIEF JUSTICE CHANDRACHUD:** This Honourable Court may extend its gender  
16 neutral reading of the SMA to the HSA and ISA. It may hold that the words widow,  
17 widower are in the Indian Succession Act, limited to issues of marriage and male Hindu,  
18 female Hindu, widow and widower in the Hindu Succession Act. Again limited to issues of  
19 marriage shall be interpreted in a manner that is agnostic of gender and [UNCLEAR]

20

21 **DR. SINGHVI:** Correct. Now what does it mean? Give me a minute. It's very important. It  
22 means that Your Lordships will first put a caveat at the beginning. We are not getting into  
23 personal laws. Second, cumulatively, Your Lordship would say that today all heterosexual  
24 couples are governed with 21 (A) in only ISA except for Hindu couples. So the large majority  
25 of non-Hindu couples are covered by ISA. Third...

26

27 **JUSTICE BHAT:** The largest number of people...

28

29 **DR. SINGHVI:** No, that's the third. I'm not avoiding it. I'm not avoiding. I understand. My  
30 Lord is right. Third. For the Hindu couples, the agnostic reading will be to words like  
31 male, female, widow, widower.

32

33 **CHIEF JUSTICE CHANDRACHUD:** In other words, we are creating a new  
34 regime essentially.

35

36 **DR. SINGHVI:** That is not a new regime. That is My Lords...

37

1 **JUSTICE BHAT:** No, no it's not. If you go down, drill down a little bit the complication. Now  
2 two spouses of the same sex. One dies now what is the kind of estate she [UNCLEAR]

3

4 **DR. SINGHVI:** If Your Lordship adopts... May I read...

5

6 **JUSTICE BHAT:** Then you see when it comes to male, of course he will be treated as a son.  
7 When it is a female, she'll be treated as a daughter. Question is, what is that spouse? Will that  
8 spouse be treated as husband?

9

10 **CHIEF JUSTICE CHANDRACHUD:** When a male Hindu dies interstate, for the first  
11 priority is to the widow. If it's a same sex male couple and the male has died interstate, there'd  
12 be no widow?

13

14 **DR. SINGHVI:** No My Lords. There will be...

15

16 **CHIEF JUSTICE CHANDRACHUD:** So what you are now therefore saying that read  
17 widow.

18

19 **DR. SINGHVI:** That need to be a compliant [UNCLEAR]

20

21 **JUSTICE BHAT:** [UNCLEAR] Willy-nilly, we do enter into the personal law or  
22 replace formulation has one...

23

24 **DR. SINGHVI:** Surviving spouse. That's true.

25

26 **JUSTICE BHAT:** See, it is a bit oversimplus. Hindus, you say only Hindus. No problem, but  
27 at the same time there is no problem when it comes to Indian Succession Act. Qua the  
28 Christians. It anyway applies to them.

29

30 **DR. SINGHVI:** No, I have no problem with ISA.

31

32 **JUSTICE BHAT:** Muslims are the one who are now bound by the ISA. Yes?

33

34 **DR. SINGHVI:** No. May I just say. There is a third option I've given. The problem is arising  
35 because of 21 (A), which takes you back. It is not arising for any other category. So Muslims  
36 and Christians who go under heterosexual couples under SMA, go under ISA. Now the third  
37 one is..

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**CHIEF JUSTICE CHANDRACHUD:** Look at how that third. You are yourself struggling at an intellectual level. You say it is submitted that there is a third option that this Honourable Court may hold that since religious and personal or related issues by agreement of parties are beyond the scope of ethos of the..[UNCLEAR]

**DR. SINGHVI:** That is what we started the matter with. We are saying outside...

**CHIEF JUSTICE CHANDRACHUD:** We can't rule on [UNCLEAR] by saying that look by agreement of parties this the agreement. Create a minefield for a future Bench.

**DR. SINGHVI:** My Lords forget my agreement. Your Lordships is saying that from this inception, the petitioner... My Lords Kindly read the whole paragraph. This matter started by the petitioners, who invoked Your Lordship's Court to say we don't want to get into personal laws. Your Lordship can certainly rely on that petition, but now read the whole paragraph. Just allow me. Third paragraph. It is submitted that the third option this Honourable Court may hold that since religious and personal or related issues. Forget agreement of parliament. Kindly delete that word. I mean I don't want to. Not necessary also. Are beyond the scope of this litigation, which Your Lordships have declared at the beginning when the matter started. It follows that personal law statutes as well as provisions of secular laws, that relate back to personal laws, that is, only 21 (A) are excluded from consideration. Since 21 (A) itself was introduced as an exception to the regime under 19 to 21, non-consideration of the issue would simply mean a reversion to the default regime of ISA.

**JUSTICE KOHLI:** So, are we reading up or are we reading down by doing that? Which of the two would it fall under?

**DR. SINGHVI:** Well, I am saying there are two options. Either it will all fall under ISA, or Your Lordship may apply, <UNCLEAR> personal interpretation for HSA Hindus.

**JUSTICE BHAT:** Then come back to the old position, that when it comes to same sex couples, we will interpret it in a particular manner. When it comes to heterosexual couples, we will read all those laws in a different manner. We will have to have those in different interpretive tools.

**DR SINGHVI:** Can I just summarize. After a preliminary statement that when the matter started, Your Lordship had made it clear and the petitioners have also said that there is no

1 going into personal law. Your Lordship may adopt either of the  
2 two. Allow me to just summarize. One, that everybody is under ISA, and 21 (A) will not apply  
3 to the same sex. Alternatively, everyone is at the ISA, because ISA is not posing a problem. But  
4 for same sex Hindu couples, Your Lordship reads the word spouse or a word person. That's  
5 the summary of the whole thing. That much Your Lordship will have to do. If it is beyond the  
6 bounds of judicial writing, it is beyond the bounds. Now, please see the logic in my para 50.  
7 But I am saying this cannot be the complete exclusion, which the Respondents also want.

8

9 **JUSTICE BHAT:** But then there is a classification amongst the same sex couple. You are  
10 saying that those who fall in 21(A), you treat them differently. Leave it at that. For the  
11 others you have ISA. You are actually sub-classifying now.

12

13 **DR. SINGHVI:** Not in the second option, in the third option, yes. In the second option, the  
14 better option is, Your Lordship interprets it to mean spouse or person. Then there is no such  
15 problem.

16

17 **CHIEF JUSTICE CHANDRACHUD:** For Hindu non-heterosexual couples, would be  
18 governed exclusively by the ISA, according to you?

19

20 **DR SINGHVI:** On option three not an option two, this is important. Let us forget option  
21 three.

22

23 **JUSTICE BHAT:** Then neither are we reading down, nor are we reading up, nor are we  
24 striking down 21 A.

25

26 **DR SINGHVI:** Let me leave aside option three. Let us say, that Your Lordship keeps 21 A.

27

28 **CHIEF JUSTICE CHANDRACHUD:** Dr. Singhvi, we are not writing a blog. We are writing  
29 a judgment for society.

30

31 **DR SINGHVI:** Your Lordship is keeping 21 A. Let me tell Your Lordships, how I would  
32 respectfully submit a judgment, can be written with 21 A, existing. It will certainly not be a  
33 blog My Lords.

34

35 **JUSTICE BHAT:** You may have that legislator's pen elsewhere but you can't persuade us to  
36 use this here.

37

1 **DR SINGHVI:** I can only make a submission here. Let us, just for a minute, focus on 21  
2 A. Your Lordships may adopt the second option, 21A, is given full force, if Your Lordship reads  
3 the word spouse and person. That's one sentence answer. Forget the third option. 21A is  
4 excluded, as My Lord, Justice Bhat said, only in the third option. In second option, since  
5 21A, is there, Your Lordship applies it, but Your Lordships have to do person or spouse, that  
6 much of reading. That's the long and short of it. Now, is it such an insuperable thing that the  
7 whole case should be a mere declaration of marriage? Then there is virtually an empty shell.

8

9 **CHIEF JUSTICE CHANDRACHUD:** Is it a stent.

10

11 **DR. SINGHVI:** I would say it is only a cardiac check-up.

12

13 **CHIEF JUSTICE CHANDRACHUD:** Or is it a transplant.

14

15 **DR. SINGHVI:** Cardiac check-up that too by a physician, not a surgeon.

16

17 **SPEAKER:** Ultimately we are saying, court please have a heart, that's all it is saying.

18

19 **JUSTICE BHAT:** That's neatly put.

20

21 **DR SINGHVI:** Just see the conclusion at para 15.

22

23 **CHIEF JUSTICE CHANDRACHUD:** Yes.

24

25 **DR. SINGHVI:** Just see the conclusion para 15. Because then I have these special categories  
26 coming after that. It would not follow from this approach. Now I am giving the answer to a  
27 possible objection to my approach. It will not follow from this approach that, non-  
28 heterosexual Hindu couples who marry under SMA, would be excluded from legal succession  
29 regimes altogether. Today....

30

31 [NO AUDIO]

32

33 **CHIEF JUSTICE CHANDRACHUD:** We'll resume tomorrow. I think it should be around  
34 twelvish. But we will resume the moment we are ready.

35

36 **DR. SINGHVI:** Yeah. I'll take very little time and...

37

1 **CHIEF JUSTICE CHANDRACHUD:** Now for all of you on this side, 1 hour flat. So  
2 please in the interest of time.

3

4 **MUKUL ROHATGI:** I only want to make a suggestion. No argument.

5

6 **CHIEF JUSTICE CHANDRACHUD:** Yes, yes Mr. Rohatgi.

7

8 **MUKUL ROHATGI:** My suggestion is this. If you agree My Lord to some part of SMA, then  
9 it is there.

10

11 **CHIEF JUSTICE CHANDRACHUD:** Then? Sorry.

12

13 **MUKUL ROHATGI:** If you don't agree to SMA, I'm making that suggestion as an  
14 alternative. Suggestion is this. That Your Lordship grants us a declaration that we have a right  
15 to marry. Now My Lord, we require in reality, some State recognition, a document that, yes,  
16 you have got married. I go to a bank. I go to an insurance company. I want an insurance for a  
17 family. I need to have a document. I can't go with the judgment of the Supreme Court and say  
18 I have a right to marry and I am married. The bank manager of the insurance will say show us  
19 some proof. Therefore, I am submitting that my lord, a document of marriage, by view of an  
20 affidavit between two parties, that I take you as a spouse in marriage, can be a via media for  
21 registration under section 18 of the Registration Act, which is registration of an optional  
22 document, not SMA. So I steer clear of SMA. I have two affidavits. I take you as my spouse.  
23 You take me as my spouse. That affidavit form I have taken from the act. With that affidavit, I  
24 can go and have a registration. So if I go to a bank I can show my Lord, I have some  
25 registration. How else will I have it? My Lords, Section 18... I will need some document. Just  
26 keep My Lords Section 18 in view. 18(F) is an optional document.

27

28 **DR. SINGHVI:** This is obviously wholly without prejudice.

29

30 **MUKUL ROHATGI:** I am saying steering clear of..., I am saying so. I am at the  
31 last, I'm at the bottom rung.

32

33 **SAURABH KIRPAL:** We can't get everything we have to. We have to take what it is.

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35 **MUKUL ROHATGI:** Yes.

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37 **ADVOCATE:** My Lords may I just take 2 minutes.



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**JUSTICE KOHLI:** Tomorrow, tomorrow.

**ADVOCATE:** My Lords may I just take 2 minutes?

**JUSTICE KOHLI:** Tomorrow. Tomorrow.

**CHIEF JUSTICE CHANDRACHUD:** A tired soul is not a receptive soul.

**JUSTICE KOHLI:** And the heart would still be in the right place.

**ADVOCATE:** My Lords [UNCLEAR]

**CHIEF JUSTICE CHANDRACHUD:** Online you want? Sure, no difficulty. Yes come online. No difficulty.

***END OF DAY'S PROCEEDINGS***